LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 2 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 929

MARVIN J. MORSE, et al.,

Appellants

vs.

D. A. HINDMAN, et al.,

Appellees

ON APPEAL FROM THE KANSAS SUPREME COURT

JURISDICTIONAL STATEMENT

MARVIN J. MORSE
Pro-se Appellant
980 Barkley Court,
Pinole, California 94564

INDEX

Page

Statement of the Case 1

Citations to Opinions 2

Jurisdiction 4

Statutes Involved 5

Constitutional and Statutory Provisions ... 5
Kansas Constitutional and
Statutory Provisions 9

Questions Presented 11

When the defendants before the Federal District Court in what was formerly a common-law suit in ejectment, brought by plaintiffs out of possession and seeking to recover title to and possession of real property, commences in the State courts an equity action to quiet title to the same real property and against the plaintiffs in Federal court ---

1. By such an inversion of parties, and/or under Kansas law, can the Federal plaintiffs be denied a jury trial under the Seventh Amendment to the United States Constitution; the Kansas constitution, Bill of Rights section 5; or Chapter 60-238 and 60-239 of the 1964 Kansas Statutes annotated. 13

2. Would the continuous exercise of concurrent, in rem jurisdiction, over strong objections of the Federal plaintiffs, by both State and Federal courts be a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution and/or would the State court proceedings be totally void under Article VI of the United States Constitution. 13

3. Whether the Kansas State court, by misstating appellant's claims of title and by applying principles of law totally unrelated to those claims and defenses has denied appellants rights to Due Process of Law under the Fourteenth Amendment to the United States Constitution. 14

4. Whether the adoption of the State court judgment by the Federal District Court, under the doctrine of res judicata, while the State court judgment is on appeal to the United States Supreme Court be a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution. 14

5. Whether in a Kansas quiet title action, under the Statute of Frauds (K.S.A. 33-106) is the admission of parole testimony and/or hearsay evidence offered by appellees in order to alter the effect of a recorded conveyance, an executed contract and/or the validity of purportedly final judicial proceedings a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution..... 14

Statement of the Case 13

The Federal Question Presented is Substantial. 24

The Courts jurisdiction on appeal 24
A jury trial is required in Kansas 24
Quiet title actions 24
The Federal Court has exclusive Jurisdiction 26

Conclusion 39

APPENDIX

Kansas Supreme Court
Opinion - Hindman v. Shepard 105 Kan 107, 456 P2d 103 .....A. 1
Order - Denying Motion to Dismiss A.48
Order - Denying Rehearing A.49
Opinion - Wood River Oil v. Madden 169 Kan. 633, 22 P2d. 154 ..... A.76

Rook County District Court
Opinion - Denying Jury trial A.30
Opinion - Findings of Fact and Conclusions A.31
Judgment A.42
Journal Entry - Denying Motion to Amend Findings of Fact A.42
Journal Entry - Denying Motion for New Trial A.46
Journal Entry - Denying Motion to Dismiss. A.49
CASE No 7807 A.97

United States Supreme Court
Order granting extention of time to docket appeal A.50

United States District Court for Kansas
Ruling on Special Issue of Class Action .. A.51
Order Denying Injunction to Stay Proceedings A.56
Order Denying Plaintiff's Motion for Summary Judgment A.58
Order Denying Rehearing of Injunction against State Court A.63
Order granting Stay A.65
Journal Entry of Judgment A.94

United States Court of Appeals, Tenth Circuit
Opinion - Dismissing Appeal from Stay order A.70
Opinion - Denying Injunction in Morse v. Rooks County Dist. Court Case No. 20-69 ..... A.74

STATUTES

Constitutional and Statutory Provisions
Article III, Section 1. 5
Section 2. 6
Article IV, Section 2. 6
Article VI. 6
Title 28 U.S.C. Section 1332 (a) 7
Title 28 U.S.C. Section 1651 (a) 7
Title 28 U.S.C. Section 2283 7
Supreme Court Rule 10(4) 7
Amendment V. 8
Amendment VI. 8

Amendment XIV. 8
Title 28 U.S.C. 1257(2) 8
Title 28 U.S.C. 1257(3) 9

Kansas Constitution and Statutory Provisions
Bill of Rights Section 5 9
Bill of Rights Section 17 9
Bill of Rights Section 18 9
Article 3 Section 1 9
Article 3 Section 3 10
K.S.A. 60-2102(a) 10
K.S.A. 60-2106(a)(c) 10
G.S. 4713 (1910) 10
K.S.A. 60-1001(a) 11
K.S.A. 60-1002(a) 11
K.S.A. 60-238(a)(b) 11
K.S.A. 60-239 11
K.S.A. 33-106 13

CASES CITED

Atkins v. Crowe 80 Kan 161, 102 P50 . 26
Ayers v. Gaff 153 Kan 209, 109 P2d 202 34
City of Osawatomie v. Slayman 182 Kan 70, 332 P2d 910 27
Covel v. Heyman 111 U.S. 182 28
Gordon v. Munn 83 Kan 242, 111 P. 177 27
Hansen v. Denkla 357 U.S. 235 34
House v. Mayo 324 U.S. 42 5
Morse v. Hindman 394 U.S. 943 25
Morse v. Hindman 397 U.S. 918 24
Mulane v. Central Hanover Trust Co. 339 U.S. 306, 94 L.Ed. 865 36
Oliphant v. Comm're 18 Kan 386 27
Paris v. Oil Co. 108 Kan 330, 195 P2d 870 27
Pen. Co. v. Pennsylvania 294 U.S. 189 28
Re French Estate 242 Iowa 113, 44 NW2d. 706 36
Re 620 Church St. Corp. 299 U.S. 26 . 5
Wood River Oil Co. v. Madden 169 Kan 633, 220 P2d. 154 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

MARVIN J. MORSE, et al.,
Appellants

vs.

D. A. HINDMAN, et al.,
Appellees

ON APPEAL FROM THE KANSAS SUPREME COURT

JURISDICTIONAL STATEMENT

STATEMENT

Appellant appeals from the the final order and the judgment in D.A. Hindman and Charley A. Lynd v. Mary Catherine Shepard, et al, 205 Kan. 107, entered on April 11, 1970, by the Supreme Court of the State of Kansas, which is the highest court in the State of Kansas in which a de-

1. The additional appellants under Rule 10 (4) are: Margaret Christenson; Bernadine Scott; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Elizabeth Hanson; Catherine M. Hanson; Shirley Y. Henderson; Anna Alley; Barbara Hillmon; Ethel Merritt; Laura Merritt; Francis Ghelfer

cision of this case could be had.

Appellant submits this statement to show that the United States Supreme Court has jurisdiction of this appeal; that in the prosecution of error to the Kansas Supreme Court it was insisted and relied upon by counsel for appellants Christensen, Scott, Hillman, Alley, and Laura Merritt that they were entitled to a jury trial; by this appellant that the Federal Courts have exclusive jurisdiction over the disputed property, therefore, the State courts are acting without jurisdiction; and that the court determined said issues adversely to appellants.

CITATIONS TO OPINIONS

The opinion of the Kansas Supreme Court (A-1) is reported at 105 Kan. 107, 456 P2d 103. The order denying a rehearing is not reported. The district court's judgment (A-42), findings of fact and conclusions of law (A-31), and the opinion (A-30), denying a jury trial are not reported. The order of the Kansas Supreme Court denying appellants' motion to dismiss for lack of jurisdiction (A-49), is not reported. The order of Mr. Justice Byron White (A-50), granting additional time to docket the appeal has not been reported.

A companion case pending in the Federal courts involving the same dispute between all of the parties to this appeal is now on appeal from a judgment of the United States District Court for the District of Kansas (A-9[illegible]), which has not

yet been reported. The order of the Federal District Court denying appellants' motion to amend the judgment (A-94), has not been reported. The ruling on special issue of class action (A-51), has not been reported.

The order denying injunction to stay (state court proceedings A-58), has not been reported. The order denying plaintiffs' motion for summary judgment (A-58), has not been reported.. The order denying appellants motion to vacate the order denying an injunction (A-63), has not been reported. The order granting stay (A-65) has not been reported.

The opinion of the Tenth Circuit Court of Appeals (R. 70), dismissing the appeal from the above stay order has not been reported.

The opinion of the Tenth Circuit Court of Appeals in a companion case (A-74), Morse v District Court of Rooks County, Kansas, et al, has not been reported.

The opinion of the Kansas Supreme Court in a related case (A-76), Wood River Oil v Madden, is reported at 169 Kan. 633, 220 P2d 154.

The decision of the District Court of Rooks County, Kansas, in a related case (A-99), Lynd v Hillman, has not been reported.

JURISDICTION

This is a suit to quiet title to real property filed in the District Court of Rooks County, Kansas, on October 28, 1966, by appellees Hindman and Lynd under K. S. A. 60-1022, and against the eight remaindermen beneficiaries of a testamentary trust. At the time suit was initiated Hindman and Lynd were defendants to a suit in ejectment filed on March 3, 1966 in the United States District Court for the District of Kansas by two of the remaindermen and against all adverse claimants. After the death of defendant Shepard her children were substituted in as transferees under a recorded conveyance.

The district court denied a timely made demand for jury trial by counsel for appellants Christensen and Scott and trial was to the court. On September 5, 1968, the district court entered judgment for appellees, thereafter appellants filed their appeals to the Supreme Court of the State of Kansas.

On January 17, 1969, appellant Marvin J. Morse docketed the appeal in the Kansas Supreme Court, along with an intermediate record on appeal, pursuant to K. S. A. 60-2701 (6) (j) and thereupon filed a motion to dismiss the action for lack of jurisdiction, showing that the Federal courts had exclusive jurisdiction over the disputed real property and praying "for an order setting aside and vacating the service of summons and petition; orders; findings; conclusions; and judgments made and entered by the District Court . . . and that all proceedings had therein be found void and held for naught"

(R. 352-354). On January 29, 1969, the Kansas Supreme Court entered an order denying the motion to dismiss (A-8).

The full appeal was thereupon perfected and the Kansas Supreme Court entered an opinion affirming the district court judgment on April 11, 1970. On June 4, 1970, the timely filed motion for rehearing was denied. On July 16, 1970, the notice of appeal to the United States Supreme Court was filed in the Supreme Court of the State of Kansas.

The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1257 (2).

The certiorari jurisdiction of this Court also exists under 28 U.S.C. 1257 (3) and 28 U.S.C. 1651 (a). The cases sustaining the Court's jurisdiction under 28 U.S.C. 1651 (a) are House v. Mayo, 324 US 42 and Re 620 Church St. Corp., 299 US 24, 26.

STATUTES INVOLVED

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 1. The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges of both the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated times, receive for their Services,

a compensation, which shall not be diminished during their Continuance in Office.

Section II. The Judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Counsels; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; between citizens of different States; -- between citizens of the same State claiming Lands under Grants of different States, and between a State, or a citizen thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Counsels, and those in which a State may be a party, the Supreme Court shall have original Jurisdiction. In all other cases above mentioned the Supreme Court shall have appellate Jurisdiction, both as to law and fact, with such Exceptions and under such regulations as the Congress shall make.

Article IV, Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article VI. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of

the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 28 U.S.C. Section 1332 (a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -- 1. Citizens of different States.

Title 28 U.S.C. Section 1651 (a). The Supreme Court and all courts created by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. Section 2283. A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments.

United States Supreme Court Rule 10 (4). All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this court, unless the appellant shall notify the clerk of this Court in writing of his belief that one or more of the parties below have no interest in the outcome of the appeal.

Amendment V. No person shall be . . . deprived of life, liberty or property without due process of law.

Amendment VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV. No State shall make or enforce and law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 28 U.S.C. Section 1257 (2). Final Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

3. By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties of laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held on authority exercised under, the United States.

KANSAS CONSTITUTION AND STATUTORY PROVISIONS

Bill of Rights Section 5. The right of trial by jury shall be inviolate.

Bill of Rights Section 17. No distinction shall ever be made between citizens of the state of Kansas and citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law.

Bill of Rights Section 18. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administrated without delay.

Article 3, Section 1. The judicial power of

this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts as may be provided by law; and all courts of record shall have a seal to be used in the authentication of all process.

Article 3, Section 3. The supreme court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as may be provided by law.

K. S. A. 60-2102 (a). The appellate jurisdiction of the Supreme Court may be invoked as a matter of right from: (4) a final decision in any action, except in an action to recover money, the amount in controversy must be in excess of five hundred ($500). In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceeding shall be reviewable.

K. S. A. 60-2106 (a). It shall be the duty of the judges of the supreme court to prepare and file with the papers in each case, the opinion of the the court upon the question of law arising in the case, within sixty (60) days after the decision of same.

(c) The supreme court may by rule provide for post decision motions for rehearing or other relief.

G. S. 4713 (1910). Issues of fact arising in actions for recovery of money, or specific real or personal property shall be tried to a jury, unless a jury trial is waived, or a reference is ordered as hereinafter provided.

60-1001 (a) In any action to recover possession of real property, including an oil or gas lease or mineral interest, it shall be sufficient if the petition state that the petitioner has a legal or equitable interest therein and the right to possession.

60-1002 (a) An action may be brought by any person claiming title or interest in personal or real property, including oil and gas leases, mineral or royal interests, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim.

60-238 (a) The right of trial by jury as declared by section 5 of the bill of rights in the Kansas constitution, and as given by a statute of the state shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

60-239. When trial by jury has been demanded as provided in section 60-238, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open

court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes.

K.S.A. 33-106. No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person . . . or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing.

QUESTIONS PRESENTED

When the defendants before the Federal District Court in what was formerly a common-law suit in ejectment, brought by plaintiffs out of possession and seeking to recover title to and possession of real property, commences in the State courts an equity action to quiet title to the same real property and against the plaintiffs in Federal court ---

1. By such an inversion of parties, and/or under Kansas law, can the Federal plaintiffs be denied a jury trial under the Seventh Amendment to the United States Constitution; the Kansas constitution, Bill of Rights section 5; or Chapter 60-238 and 60-239 of the 1964 Kansas Statutes annotated.

2. Would the continuous exercise of concurrent, in rem jurisdiction, over strong objections of the Federal plaintiffs, by both State and

Federal courts be a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution and/or would the State court proceedings be totally void under Article VI of the United States Constitution.

3. Whether the Kansas State court, by misstating appellant's claims of title and by applying principles of law totally unrelated to those claims and defenses has denied appellants rights to Due Process of Law under the Fourteenth Amendment to the United States Constitution.

4. Whether the adoption of the State court judgment by the Federal District Court, under the doctrine of res judicata, while the State court judgment is on appeal to the United States Supreme Court be a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution.

5. Whether in a Kansas quiet title action, wherein the Statute of Frauds (K. S. A. 33-106) is applicable, is the admission of parole testimony and/or hearsay evidence offered by appellees in order to alter the effect of a recorded conveyance, an executed contract and/or the validity of purportedly final judicial proceedings a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Under the will of James E. Atherton, seven persons took a life estate in separate real property, under identical granting clauses, with remainders vesting at the death of testator in 1925. There were four children: Orion Atherton, Martha Gish, Flora Ouderkirk and George Atherton; two grandchildren: Mary Dunlap, the Daughter of Orion and James Atherton, the son of George and a namesake of testator); and a great grandchild: Mary Hillman, a granddaughter of George. Three life tenants are still living: Flora, Mary Dunlap and Mary Hillman.

In 1934, the grandchild, James Atherton, died intestate, an unmarried minor without issue. He died seized of two separate interests under the will, first, his life estate in his own property, and second, a 1/9th remainder estate in fee simple to the life estate of George Atherton. Thus, as heirs-at-law, his parents George and Hattie Atherton inherited a 1/9th remainder interest, as tenants in common, to the life estate of George Atherton.

In November of 1934, George Atherton, through his attorney D. A. Hindman, filed suit to quiet title to his son's life estate, claiming he died seized of the fee simple title (R-287). Flora Ouderkirk filed an answer and cross-claim, attacked the will of testator and argued the will created a life estate with remainder over, that the devise failed, and asked for partition. The cross-claim was upheld and the property was ordered partitioned. A sheriff's sale resulted; the property was purchased by D. A. Hindman and he

still owns mineral interests thereto (Rook County District Court case No. 6666).

From 1930 to 1943, George Atherton failed to pay the taxes on the property he took a life estate in under the will and in 1944 the county brought suit to foreclose taxes on the property. George Atherton, through attorney D. A. Hindman, filed an answer in the tax foreclosure suit claiming to be "the owner of such an interest . . . as will entitle him to the balance of the proceeds of said property . . . (after costs) have been paid." The court granted the motion and ordered the property to be sold on February 11, 1944 (R. 150-160 case No. 7783).

On February 10, 1944, the property was redeemed from the tax sale in the name of George Atherton (R. 160) and on February 11, 1944, George and Hattie Atherton executed a warranty deed purporting to convey the property to Charley A. Lynd (Hattie's brother; R. 145). This litigation arises from this transaction and related events.

On February 23, 1944, Charley A. Lynd, through attorney D. A. Hindman, filed suit to quiet title to the property in Rooks County District Court case No. 7807 (R. 162-174). The defendants are: Barbara Hillman and Gene Hillman; Catherine Shepard and Fred Shepard; Laura Merritt, single; Margaret Christensen and Alfred Christensen; Anna Alley and Clarence Alley; Elida Merritt and Leslie Merritt; Francis Gfeller and Myron Gfeller; Bernadine Wasinger and Linus Wasinger; Flora Ouderkirk and O. E. Ouderkirk;

Orion Atherton, single; and Martha Gish and Samuel Gish.

Service of summons (but no petition) was made on Laura Merritt, Anna and Clarence Alley, Frances and Myron Gfeller, and on Flora and O. E. Ouderkirk. Legal notice of the pending suit was published in the local newspaper and on March 9, 1944, Hindman sent newspaper clippings of the publication service to: Barbara Hillman, Catherine Shepard, Margaret Christensen, Elida Merritt, Bernadine Wasinger, Martha Gish, and to Orion Atherton.

In his affidavit for constructive service (R. 165-167), Hindman, under oath, gave the name and address of each of the defendants named in the action but the record does not show that defendants Gene Hillman, Fred Shepard, Alfred Christensen, Leslie Merritt, Linus Wasinger, or Samuel Gish were ever given personal knowledge of the pending litigation or given an opportunity to answer the complaint.

The will of testator was made a part of the petition and the court was asked it make a judicial construction of the will, to find that it created a fee tail estate and that the conveyance to Lynd conveyed a fee simple title. On April 12, 1944, judgment in default was entered by the court purportedly finding that "the Last Will and Testament of James E. Atherton created an estate in fee tail in the following described real property . . . to George W. Atherton, and the children of his body, and the last will and testament of said decedent is so construed." (A. [illegible]) 97-101

Appellant insists that George Atherton, as life tenant of the disputed property, was an indispensable party to that litigation, that the judgment is void on its face, and that every party dealing with this property is charged with that knowledge.

On April 7, 1944, George and Hattie Atherton and Charley and Elida Lynd executed a contract specifying that if the title to the property was cleared that the Lynds would convey to the Athertons 3/8ths mineral interest but if the suit failed to clear the title that the Athertons would reimburse the Lynds expenses and the Lynds would reconvey to the Athertons (R. 137). Appellant insists that the conveyance and contract to reconvey created a redeemable mortgage on the property and, furthermore, is conclusive proof that the life tenant, as a trustee, was dealing with trust property for his own profit.

In January of 1949, Orion Atherton executed an oil lease, covering the property he held a life estate in, under the will, to Wood River Oil Co., and three weeks later executed a second and conflicting lease to Ed F. Madden. The Madden lease was ratified by all of the remaindermen to the Orion estate, and Madden began drilling under the second lease.

In June of 1949, Wood River Oil Co. filed suit to quiet title to its lease and for a judicial construction of the will. Attorney Richard Jones answered the complaint for Madded and retained attorney D. A. Hindman as local counsel. At the trial, Wood River set up case No. 7807 (the case herein challenged) as a prior construction of the

will finding that at estate in fee tail was created. In his address to the court, Hindman answered the claim by stating, "And I will say for the benefit of counsel here and in defense of the court that those were mostly ex-parte proceedings, because they were not contested cases, particularly the quiet title suit No. 7807, in which the court did construe that the entailment had been broken where there was a fee tail estate in reference to certain land."

George Atherton had reached an advanced age . . . and Mr. Atherton and all of his children came into court and urged the court to make some finding in that case . . .

So the court made those findings because they seemed to be what everybody in those particular cases wanted, which seemed to be a matter of expediency." (R. 188)

Judgment was entered quieting Madden's lease construing the will as creating a life estate with remainder vesting at the death of testator, that the surviving husband of a deceased remainderman owned a share equal to the other remaindermen and in the memorandum opinion Judge Skinner, in answer to the claims of Wood River, under case No. 7807, states, "This is another piece of the Atherton land, which was left under the will, under a like clause as the one have here before us in this case. The devise was to George W. Atherton, who deeded the land in question to Charley A. Lynd, plaintiff therein, for the purpose of cutting off the entailment. The purpose of this suit was to enable the said George W. Atherton and the heirs of his body then living to

execute an oil and gas lease and the court was asked to construe the provision as creating a fee tail estate, the holder of the life estate and the remaindermen all joining in the request. The court advised counsel that he was very doubtful that an estate in fee tail was created but, inasmuch as all the parties were in court asking for relief that would enable them to advance their interests by the securing of an oil and gas lease on the property that the court would so find. These are the historical facts in case numbered 7807." (R. 175).

The appellants herein, as defendants in case No. 7807, were in total default in those proceedings, they were not in court, they made no communication with the plaintiff, with Hindman, nor the Court, and no representations made by the principals involved in the Wood River case was influenced by any act of these appellants.

Wood River Oil Co. appealed the decision to the Kansas Supreme Court and the judgment was affirmed in Wood River Oil Co. v Madden, 169 Kan. 633, 220 P2d 57 (Opinion A-76).

On May 14, 1961, George Atherton died testate. Under their joint will, drawn up and witnessed by Hindman (R. 198-199) the survivor, Hattie, became the owner of all his personal and real property with the provision that all personal and real property left at the death of the last survivor shall go to the children. Thus Hattie owned a 1/9th interest in the property, with the children as contingent remaindermen.

On December 25, 1964, Hattie died testate and the eight surviving daughters became the owners,

by testate succession, of the fee simple title to all the property herein disputed.

On March 3, 1966, (14 months and 9 days after Hattie's death), a class action was filed in the United States District Court at Topeka, Kansas, by two non-resident remaindermen, Shepard and Christensen, under 28 U.S.C. 1332 (a), asserting immediate rights to title and possession of the property and to oust Lynd, Hindman and numerous co-defendants claiming mineral interests under leases executed by George and Hattie Atherton, Charley and Elida Lynd, and D.A. Hindman and wife Pauline.

Answers by all defendants were filed; the defense that the parties were not sufficiently numerous to maintain a class action was made, and on October 21, 1966, the court entered an order styled "Ruling on Special Issue of Class Action Sufficiency" (A.51) upholding special defense but granting plaintiffs leave to file an amended complaint.

On October 28, 1966, Hindman and Lynd filed the instant action in the District Court of Rooks County Kansas seeking to quiet title to the same real property and against all eight of the remaindermen. On March 8, 1967, the answer and cross petition of Mary C. Shepard was filed (R.-11) and paragraph No.44 judicially appraised the court of the pendency of the Federal court proceedings (R. 18); the answer and cross petition of Margaret Christensen and Bernadine Scott was filed on March 27, 1967 (R. 19); demand for jury trial under K.S.A. 60-238 and 60-239, was made on May 3, 1967 (R. 23); Hindman and Lynd's

answer to the cross-claim of Christensen and Scott was filed on May 3, 1967 (R. 24). On April 8, 1967, the court entered an "Opinion" denying a jury trial (A. 26). Trial was to the court and on August 5, 1968, the court filed a memorandum opinion, findings of fact and conclusions of law (A. 31). On September 5, 1968, the court entered judgment for appellees (A. 42). On September 26, 1968, Francis Gfeller filed Notice of Appeal to the Kansas Supreme Court followed by numerous other appeals (R. 44-46). On October 14, 1968, the court entered an order denying appellant's motion for new trial (A. 46). On November 13, 1968, the Notice of Appeal of Marvin J. Morse was filed (R. 47). On January 14, 1969, the court entered an order denying this appellant's motion to dismiss for lack of jurisdiction (A. 47) and on January 15, 1969, this appellant filed Notice of Appeal for intermediate ruling (R. 50).

On January 14, 1969, this appellant docketed the appeal in the Kansas Supreme Court and filed a motion to dismiss for lack of jurisdiction, praying for an order "setting aside and vacating the service of summons and petition; all subpoenas for taking of depositions; orders; findings; conclusions; and judgments made and entered . . to dismiss said action, and that all proceedings had therein be found void and held for naught" (R. 354). On January 17, 1969, the Kansas Supreme Court entered an order denying the motion (A. 48). The appeal was perfected and the opinion of the Kansas Supreme Court was filed on April 11, 1970 (A. 1). This appellant filed a motion for extension of time to file a petition for rehearing on April 28, 1970 pursuant to K. S. A. 60-2701 (b) (d) and within the twenty-day period of time allowed in K. S. A. 60-

2701 (6) (b) (R. 368). Although the motion was never ruled on the petition for rehearing was filed within the requested time and petitioner therein attempts to persuade the Kansas Supreme Court that it had erred in its ruling on the Constitutional right to a jury trial and on the question of exclusive jurisdiction of the Federal Courts. Also, that the court had misstated appellants claims that: the life tenant, George Atherton, was an indispensable party in case No. 7807 wherein the subject matter was a judicial construction of the will of James E. Atherton; that both George and Hattie Atherton, as heirs of a deceased vested remainderman, were indispensable parties in a suit to construe the will; the sufficiency of service on defendants Gene Hillman, Fred Shepard, Alfred Christensen, Leslie Merritt, Linus Wasinger, and Samuel Gish; the property rights of said defendants in the disputed property; the rights of said defendants to appear and defend; the state of the record in reference to said defendants domicile; the grounds for stay of and by the Federal Court proceedings and numerous other errors and misstatements appearing in the Kansas Supreme Court judgment (R. 332-351). On June 4, 1970, the court entered an order stating, "Motion by Appellant Marvin J. Morse for rehearing Considered and DENIED." (A. 49). On June 6,1970 appellant filed Notice of Appeal to the United States Supreme Court (R. 370) in the Kansas Supreme Court and on August 24, 1970, Mr. Justice Byron R. White granted appellants' request for extension of time to November 1, 1970, to docket the appeal in this Court (A. 50)

In the Federal Court proceedings, plaintiffs

filed their amended complaint on November 1, 1966, and thereafter moved the Federal Court to enjoin the state court proceedings. On July 31, 1967, the Federal Court entered an order denying the injunction (A. 57).

Attorney Richard Jones of Wichita made his appearance in the Federal Court as counsel for for Mobil Pipeline Company and on March 21, 1968, filed a motion for summary judgment, with exemplified copies of the proceedings in case No. 7807 attached to his motion, and, by representing said case as an adversary proceeding asked for summary judgment under the doctrine of res judicata. This appellant filed an affidavit in opposition, and on June 3, 1968, filed a motion for summary judgment. Both motions were denied (A. 58). On September 25, 1968, the Federal Court entered an order denying a rehearing of the application for an injunction against the state courts (A. 63), and on October 11, 1968, entered an order granting stay of its proceedings (A. 65). Viewing the stay order as an injunction this appellant took an appeal to the Tenth Circuit and on September 17, 1969, the Circuit Court dismissed the appeal (A. 70). Thereafter appellant sought certiorari review of that order in Morse v Hindman, 397 U.S. 918 (certiorari denied).

On November 5, 1968, this appellant filed an original injunction proceeding in the tenth circuit (Morse v Rooks County District Court, et al, No. 20-69) to enjoin the state court proceedings. The application was denied on November 12, 1968 (A. 74) and thereafter appellant sought certiorari review of that order and also of the order of the

Kansas Supreme Court denying appellants motion to dismiss in Morse v Hindman, 394 U.S. 943 (certiorari denied).

Following the entry of judgment by the Kansas Supreme Court on April 11, 1969, the Federal Court defendants moved to revive the Federal court action and each filed motions for summary judgment based on the state court judgment. This appellant filed an answering affidavit pointing out that the state court proceedings were subject, first, to a rehearing and, second, to appellate review by this Court, counsel for the remainder-men Christensen and Scott filed a motion to withdraw asking thirty days for their clients to seek counsel. On July 1, 1970, this appellant filed a motion for leave to file an amended complaint and the complaint attached thereto sets out a claim for money judgment against Mobil Pipeline Company equal to the value, plus interest, of all mineral oil removed from the property and delivered into the pipeline, arguing that attorney Richard Jones, as counsel for Madden in the Wood River case, supra, could not represent case No. 7807 as an ex parte proceeding before the Kansas courts and thereafter came into Federal court and represent those proceedings as an adversary proceeding and, charging that Mobil Pipeline Company, through its attorney, had actual or constructive knowledge that these appellants were the legal owners of this property. On August 25, 1970, the Federal Court entered an order dismissing counsel for Christensen and Scott, adopting the State court judgment as res judicata and denying appellants' motion for leave to file the amended complaint (A. 94.) On September 14, 1970, the Federal District Court denied appellants motion for new

trial and on October 1, 1970, appellant filed Notice of Appeal to the Tenth Circuit Court of Appeals from the United States District Court for the District Court of Kansas and that case is now on appeal.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL.

THE COURT'S JURISDICTION ON APPEAL

The Kansas Statutes Annotated, 60-238 and 60-239, enacted in 1964, are lifted almost verbatim from Federal Rules 38 and 39. 60-239 provides that the only grounds on which the district court can deny a jury trial is on a finding (expressed or implied) that "a right of trial by jury of some or all of the issues does not exist under the (Kansas) constitution or statutes." Thus the Kansas Supreme Court, when it affirmed the district court's ruling that "The suit was filed as a quiet title action by plaintiffs. Defendants now seek to quiet title in themselves and seek damages for having been deprived of possession. No claim could be made for the right of trial by jury except on the damages," (A. 30) by citing K. S. A. 60-239 (a) (2); 60-238; the constitution of Kansas, Bill of Rights Section 5; and the United States Constitution, (A. 20-21) automatically invoked the appellate jurisdiction of the United States Supreme Court under Title 28 U.S.C. 1257 (2).

A JURY TRIAL IS REQUIRED IN KANSAS QUIET TITLE ACTIONS

The Kansas Supreme Court held "In Kansas quiet title actions instituted by a plaintiff in possession generally involve matters of equitable cognizance and are triable without a jury." (A. 21). The controlling Kansas case is Atkins v.

Crowe, 80 Kan. 161, 102 P. 50, where the court applied section 4713 of the General Statutes of 1901 which reads: "Issues of fact arising in actions for recovery of money or specific personal or real property, shall be tried by a jury, unless a jury trial is waived, . . " and therein sets out the rule that, "actions for the trial of title to real estate shall be tried to a jury . . . the test upon this question which has been generally followed is that, where the real object of the action, whatever its form, appears to be to settle a disputed question question of title, then either party may demand a jury as a matter of right; if, on the other hand, the purpose is to obtain proper equitable relief, then the chancellor may administer it, . ." This rule has been followed in all Kansas cases where the action was for recovery of, or legal title and possession of real property, see City of Osawatomie v Slayman, 182 Kan. 770, 323 P2d 910 (ejectment); Gordon v Munn, 83 Kan. 242, 111 P. 177 (partition); Paris v Oil Co., 108 Kan. 330, 195 P. 870 (quiet title); Oliphant v Comm., 18 Kan. 386 (claims of adverse possession).

In the Kansas cases, including the one cited by the court, holding a jury was not required, the court specifically found the action was "not one for recovery of property," here in its opening statement the court states, "Some of the defendants answered denying plaintiffs title and by counterclaim they sought to establish their ownership, to have plaintiffs ejected and to recover damages for wrongful possession," (A. 1-2). Thus under Kansas precedents, appellants were entitled to jury trial. Furthermore, Hindman and Lynd as defendants in the Federal Court

ejectment action cannot invert the parties by bringing an equity action in the state courts and thereby deprive their opponents a jury trial. (Paris v Oil Co., supra and Atkins v Crowe, supra).

THE FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION

This Court said in Toucey v New York Life Insurance Company, 314 U.S. 118 on page 135 . . . The rank and authority of the (Federal and State) courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict . . .

And in Penn Co. v Pennsylvania, 294 U.S. 189 on page 196 . . . But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of a bill is treated in constructive possession of the property, and as authorized to proceed with the case . . .

In Covel v Heyman, 111 U.S. 182 . . . The forebearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principal of comity, with perhaps no higher sanction than the utility which comes from concord; but between State

Courts and those of the United States it is something more. It is a principal of right and law, and therefore a necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that RES is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial soverignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the Court from which it issues.

BY MISSTATING THE CLAIMS, DEFENSES, AND RECORD, THE COURT HAS DENIED APPELLANTS A DETERMINATION ON THE MERITS

A look at the pleadings will show that in appellees' petition Lynd alleges ownership of the surface estate and 3/8ths mineral interest and Hindman claims 2/8ths mineral interest (R. 9, par. 1) that Lynd claims title under a recorded deed executed by George and Hattie Atherton; that his title was thereafter quieted in case No. 7807 (R. 10, par. 3); that Hindman acquired title by conveyance from Lynd (R. 10, par. 4), and pray that their title be quieted (R. 10).

The answer and counterclaim of Mary C. Shepard (later adopted by Francis Gfeller, Anna Alley, Barbara Hillman, Laura and Elida Merritt, R. 11) denies plaintiffs' title and asserts that under the will George Atherton took a life estate with vested remainders in the defendants (R. 11-12, par. 1-6); that the deed was executed in conjunction with a separate contract that created a redeemable mortgage (R. 12, par. 9-10); that at the death of their son, George and Hattie inherited a 1/9th remainder interest (R. 15, par. 20); that the subject matter in case No. 7807 is the judicial construction of paragraph sixth of the will (of J. E. Atherton); and to change a mortgage into a conveyance (R. 15, par. 22); that George Atherton, as devisee named as life tenant in paragraph sixth of the will, had such an interest in the subject matter as would make him an indispensable party, and not being named, No. 7807 is void on the face of the judgment roll (R. 15, par. 23); that George and Hattie as grantors of a mortgage were indispensable parties in the quiet title part of the proceedings (R. 15, par. 24); that Mary Hillman and Mary Dunlap (as contingent remaindermen) were indispensable parties in No. 7807 (R. 15, par. 25); that the remaindermen were misled by their mother into believing their rights to the property was not contested and into taking a default judgment (R. 16, par. 28); that George Atherton died on May 14, 1961, and his will made Hattie his only heir (R. 16, par. 33); that at Hattie's death on December 25, 1964, the remaindermen inherited all outstanding interests of their parents including the power to redeem the mortgage and were the owners in fee simple of the entire estate; that their parents' will was fully administrated and closed on December 23,

1966 (R. 16, par. 34-36); that Hindman and Lynd took title with knowledge of defendants rights and are liable for waste to the extent that they have profited therefrom (R. 17, par. 39); that the purported oil leases were not made by defendants and are not on their chain of title (R. 17, par. 40); that defendants each ask $10,000 personal damages against Lynd for loss of love and affection from their ageing parents (R. 17, par. 41); defendants each ask $25,000 exemplary damages against Hindman for using knowledge of the nature of their holdings under the will, acquired as George Atherton's attorney in a scheme of fraud to destroy their inheritance (R. 17, par. 42), and that the Federal Court ejectment suit had priority (R. 18, par. 44).

The answer and counterclaim of Christensen and Scott denies plaintiffs title, asserts ownership and that plaintiffs obtained possession by willful fraud (R. 19); that plaintiffs should be ejected, that case No. 7807 is void, that plaintiffs have wrongfully removed gas and oil from the real estate and prays for judgment for the value of the oil in place, exemplary and punitive damages in the sum of $500,000 (R. 20).

The plaintiffs set up identical special defenses to the two counterclaims: (1) the claims are barred by the statutes of limitations and laches; (2) that defendants claims were adjudicated in case No. 7807 and cannot be relitigated (res judicata); (3) that the claim is a collateral attack on case No. 7807 and defendants are "estopped . . by reason of their conduct and failure to act and by reason of the terms of the judgment . . . in case No. 7807 and their failure . . . to appeal therefrom." (R. 24)

At pre-trial, counsel for Christensen and Scott argued that the statements made by Hindman recorded in the trial transcript in the Wood River Case, supra, (R. 188), supported by the trial judge's memorandum opinion (R. 175) were positive evidence that in case No. 7807 the court was led to believe that all of the remaindermen were asking for relief that would advance their interests and that this constituted fraud on the court, therefore the judgment is void and Hindman and Lynd were liable for waste and for personal and exemplary damages and insisted on a jury trial.

Counsel for Hindman and Lynd offered in evidence a letter from Hattie to Lynd, written before judgment was entered, stating that she had heard from five of the children and had written to the other three, and that all were satisfied with the transaction,(R. 127), insisted that they were acting in good faith and argued that defendants were not entitled to a jury trial in a quiet title action.

This appellant made strong objections to any trial procedure that would permit plaintiffs to use parole evidence or extrinsic and/or hearsay evidence in order to vary the terms of the conveyance and contract made between the Athertons and Lynds or to go outside the records in case No. 7807 and the Wood River Case, supra, in order to determine the validity of case No. 7807 or the nature of the estate created by the will of James E. Atherton. This objection was preserved in the assignment of errors and argued in the opening brief. (R. 298-300)

After setting out the full text of the district court's findings the Supreme Court observed that a majority of the twenty-six points raised on the appeal were challenges to those findings (A. 11) and thereafter sets out its own independent review of the certified record on appeal, to wit:

"The appellants have argued that res judicata does not apply solely because the judgment in 1944 was obtained by fraud" (A. 13). Though counsel for other appellants sought to set aside the judgment for fraud on the court, this is not the case in the Shepard counterclaim, the only claim for fraud in that counterclaim is against Hindman for exemplary damages and that cause of action did not survive in the heirs of deceased litigant and this appellant is not asserting rights in that claim.

"Appellant Morse contends George W. Atherton and Hattie were indispensable parties to the action by reason of their being the sole heir of a

son who died in 1934. Whatever rights they may have inherited . . was conveyed . . to . . Lynd." This is not an accurate statement of the claims made, argued and briefed. At no place in any order, judgment, or ruling made in either the state district court, state supreme court, Federal District Court or the rulings of the Tenth Circuit can be found an accurate presentation of the nature of the pleadings in case No. 7807; the nature of the relief sought; the nature and form of the relief granted in the judgment; and/or the nature and extent of the attack made by this appellant on that judgment. Hindman, as attorney for Lynd, attached the will of James E. Atherton to that petition and asked the court for a judicial construction of the will and to find that it created a fee tail estate in George W. Atherton and the children of his body. The judgment in that case finds that the will created a fee tail estate in George W. Atherton and the children of his body "and the will is so construed." (A. 102) This is not a quiet title action -- it is a suit to construe a will and the test of jurisdiction is whether the court had jurisdiction over all the defendants and every person who could claim an interest in the property under the provisions of the will. The challenges to jurisdiction by this appellant are:

1. The life tenant, George W. Atherton, was not made a party to that litigation and the judgment is void on its face. (Ayers v Goff, 153 Kan. 209, 109 P2d 202). In Hansen v Denkla, 357 US 235, 2 L. Ed. 2d 1283, this Court held "Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a

party a Florida court may not proceed to adjudicate the controversy. . . any defendant affected by the court's judgment has that direct and substantial personal interest in the outcome that is necessary to challenge whether that jurisdiction was in fact acquired."

2. The six defendants who were the spouses of non-resident heirs but were not given personal notice that they were being sued or given an opportunity to appear and defend. As shown above, any defendant can challenge the court's jurisdiction, without jurisdiction over these defendants the judgment is void on its face.

3. The contingent beneficiaries Mary Hillman and Mary Dunlap were not joined -- The eleventh paragraph is a forfeiture clause, in a letter to George Atherton in 1938, Hindman states his construction of that clause, to wit: "I thought it said that if anyone refused to pay the taxes it should go to the one that did pay the taxes, but it reads, "and the proceeds of the property which should go to such offending person shall go to the other of my said children . . . " Therefore I'm afraid if the taxes were paid in the name of the others it might give them all an interest." (R. 139) Appellant accepts Hindman's interpretation of that clause and insists that all persons named in the will had a vested or a contingent interest in the property and each defendant and all parties named in the will are indispensable parties in case No. 7807 and this judgment is void on its face.

4. That George and Hattie Atherton, as grantors of a mortgage were indispensable parties.

The contract to reconvey was not of record in 1944, thus this is an equitable defense and not a legal one appearing on the face of the pleadings.

"The appellants claim the judgment was fraudulent because their position in respect to the relief sought was misrepresented to the court. The court found exactly to the contrary . . primarily (on) the testimony of D. A. Hindman, Wayne McCaslin, and Clarence Lynd, who testified they did not hear any statements during the hearing concerning the appellants position or reasons why they were not in appearance." (A. 13-14). Whether the representations were made in court or in chambers is irrelevant, parole testimony cannot be used to impeach the records in the Wood River case, supra, and Hindman is estopped to deny the position taken in that action.

Appellant Morse next contends the court did not get jurisdiction over the non-resident defendant . . husbands of the (remaindermen). It appears these husbands were residing with their wives outside the state of Kansas when publication service was perfected." (A. 23). It does appear in the record where these people were domiciled. The affidavit of service alleges a post office address for each of them and that is the only reference made as to their domicile.

"No specific defect in the publication service is pointed out and we find none." In the opening brief (R. 308-311) appellant points out that "There is no question but that five of the spouses of the non-resident remaindermen were joined as defendants in 7807, that publication service was

the only attempt to get jurisdiction over them, that the affidavit for constructive service, if taken as true, gives their names and addresses, that the court could not and did not get jurisdiction over them" (R. 311) citing Mulane v Cent. Hanover Trust Co., 339 US 306, 94 L. Ed. 865, "Where the names and post office addresses of of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to appraise them of its pendency." (R. 310)

"The husband is such a proceeding is not an indispensable party" -- an indispensable party is one who, if not joined the court is denied jurisdiction -- these persons were joined but not served, thus until they were served the court did not have jurisdiction to determine anyone's rights. Nor does the doctrine of virtual representation apply here for as was said in Re Frenches Estate, 242 Iowa 113, 44 NW2d 706, 711, "It is built upon the theory that the contingent remaindermen are represented by others who have a similar interest, and . . will receive thereby actual and effective protection . . " In a default proceeding, by definition, there is no representative before the court, thus the doctrine is inapplicable (R. 345).

Without belaboring the point further, it is respectfully submitted that the defenses made were never ruled on in the court below.

Sections 1 and 2 of Article III of the United States Constitution and the Acts of Congress passed in pursuance thereto give citizens of one state the right to bring and to maintain a suit in the Federal Court in another state. A citizen who would exercise that right in an in rem proceeding in ejectment in compelled to bring his suit in the Federal Court in the state where the property is situated.

In the exercise of that Constitutional right appellants have invoked the jurisdiction and persistently demanded an adjudication of an in rem controversy by the Federal Court that had first acquired jurisdiction over the property and where the defendant lives.

If the defendants are permitted to prosecute the State court suit over the objections of appellants then it would be established that a defendant in Federal Court can remove an in rem Federal action into State courts and/or that both courts can exercise continuous in rem jurisdiction over the same real property.

The reasons for the grant to him by the Constitution of this right tohave the decision of his controversy with the citizen of another state by a Federal court was thereby to avoid the local attachments and prejudices in favor of the defendant that those who made the Constitution feared might injuriously affect the administration of justice in the state courts against the claims of citizens of other states.

Here appellants have been denied a forum in the Federal courts and were, in effect, banished

to the State courts, and, thereupon had their Federal rights to a jury trial denied by the state courts, were denied a hearing on the merits of the case and were thereafter brought back into Federal court, at the whim of their defendants, to have the Federal court put its stamp of approval on the State court judgment.

CONCLUSION

The questions presented by the appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

MARVIN J. MORSE
Pro Se Appellant
980 Barkley Court
Pinole, California 94564

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 45,622
Filed: April 11, 1970

D. A. HINDMAN and CHARLEY A. LYND, Appellees, v. MARY CATHERINE SHEPARD, FRANCES GFELLER, ELIDA MERRITT, CATHERINE MARIE RANSOM, HAROLD ALFRED MORSE, RALPH LELAND MORSE, DONALD EDWARD MORSE, ESTHER RHAECILLA HANSEN, SHIRLEY YVONNE HENDERSON, Defendants, and MARVIN JAMES MORSE, MARGARET CHRISTENSEN, BERNARDINE SCOTT, BARBARA HILLMAN, ANNA ALLEY and LAURA MERRITT, Appellants.

Appeal from Rooks district court, C. E. Birney, judge. Opinion filed April 11, 1970. Affirmed. (205 Kan. 207)

The opinion of the court was delivered by

FROMME, J.: This action was initiated by plaintiffs, D. A. Hindman and Charley A. Lynd, to quiet their title to 333 acres of land located in Rooks County, Kansas. Some of the defendants answered denying plaintiffs' title and by counterclaim they sought to establish their

ownership, to have the plaintiffs ejected and to recover damages for wrongful possession. The plaintiffs prevailed in the court below. This appeal was taken by some of the defendants.

Plaintiffs' (appellees') title to the real estate is based upon a warranty deed from George W. Atherton and wife dated and filed of record on February 11, 1944, conveying the premises to appellee, Charley A. Lynd. In addition a judgment in a quiet title action was entered in 1944 against these same defendants-appellants or their privies. Appellants' counterclaim constitutes a collateral attack upon the prior judgment quieting the title of Charley A. Lynd. The prior judgment was entered April 12, 1944 in Case No. 7807, entitled Lynd v Hillman, et al, in the District Court of Rooks County,

Kansas. No appeal was taken from that judgment. Defendants (appellants) contend this judgment is void for fraud and lack of jurisdiction.

The findings by the district court contain the facts necessary to understand the contentions of the parties. Pertinent findings of the lower court are:

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925. The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case No. 7783, styled *Board of County Comm.* v. *Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Athertons and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the

funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided 1 4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman*, in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by pub-

lication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet title suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1944, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is necessary later for them to sign the deed, they will do that. All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5.)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance that the Lynds would convey to the Athertons 3/8th interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd.

They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the

time of the tax foreclosure, the transactions with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered into possession of the property and has remained in possession and has paid taxes on the surface and 3/8th of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the

property in question. Oil production was first discovered on the property in 1931, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton succeeded to the 3 8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3 8ths royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3 8th royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen

(then Margaret Jewton) executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7897, *Lynd v. Hillman, et al.*

5. The judgment in Case No. 7897 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

A majority of the twenty-six points raised on appeal are based upon contentions by appellants that the trial court erred in its findings of fact. For us to accept these contentions it must appear there is no substantial evidence in the record supporting the trial court's findings. *Fine v.*

Neale Construction Co., 186 Kan. 537, 352 P2d 404.

Normally, findings of a negative character will not be set aside on appellate review since adequate opportunity for weighing evidence and determining credibility of witnesses is lacking. Collins v Merrick, 202 Kan. 276, 448 P2d 1.

Findings of fact will not be set aside on appellate review if substantially supported by competent evidence, nor will a judgment be overturned for insufficiency of evidence when there is substantial competent evidence to sustain it. In re Estate of Countryman, 203 Kan. 731, 457 P2d 55.

We have examined the evidence in the record. The district court's findings of fact are supported by substantial evidence.

As previously mentioned the appellants' counterclaims constitute a collateral attack upon the 1944 decree quieting title and are based upon a

claim of fraud which is the paramount issue in the case.

The trial court found that there was no fraud in connection with the 1944 quiet title action. If the appellants are not able to prevail on this issue any contentions that they are remaindermen under their grandfather's will have already been adversely adjudicated and disposed of by the judgment in the 1944 quiet title action. The appellants have argued that res judicata is not applicable solely because the judgment in 1944 was obtained by fraud. This judgment, if valid, cuts off any right or title they could possibly have had to the property.

The appellants claim that the judgment in the 1944 case was fraudulent because their position with respect to the relief sought was misrepresented to the court. The trial court in the present

case found exactly to the contrary. The evidence which supports this important finding is primarily the testimonies of Hindman, Wayne McCaslin and Clarence Lynd. Mr. Hindman testified that there was no statement made to the court during the quiet title hearing as to why the Atherton sisters were in default, nor was there a statement made to the court that everyone was jointly asking for the same relief. Mr. McCaslin, who was a court appointed attorney in the case, and Clarence Lynd testified that they did not hear any statements during the hearing concerning the appellants' positions or reasons why they were not in appearance.

Those were the only witnesses who were present at the hearing in 1944. No testimony was given by any of the defendants that they talked or corresponded with Hindman or Lynd during the

time of the 1944 quiet title proceeding. The testimony of these witnesses supports the trial court's finding that judgment was not obtained by fraud.

Another contention concerning fraud on the appellants is that they did not appear because they were led to believe by their mother that their rights would not be affected. There is no question that the defendants received notice of the 1944 suit. If they were misled by their mother as to its import such cannot be attributed to Hindman or Lynd. However, the evidence clearly showed that some of the Atherton sisters were not misled.

Mrs. Alley testified that the reason she did not make an appearance in the case was because she did not like to get involved in lawsuits.

Mrs. Shepard wrote a letter to her parents in in 1951 or 1952, which was plaintiffs' Exhibit 10.

The letter stated in part:

"Am sorry the girls can't dry up -- it's so foolish. If Uncle Charley was good enough to save what ever there is there, they should realize he's been the one who's made it possible for them to have anything. I'm sure I wouldn't bite the hand that did a favor."

Plaintiffs' Exhibit 11 is a letter from Mrs. Christensen in which she wrote:

"We would have lost the place for taxes if uncle Charlie hadn't came to the aid of the folks at that time. We all known (sic) it. The deed to Charlie can't be broken after a decree quieting title to the place. We had our chance then and didn't anyone take it. We were glad that Dad could get enough out of it to pay off the debts and to take a pension and try to enjoy life."

Mrs. Hillman and some of her sisters acknow-

lodged that their father had divided part of the proceeds from the sale of the farm with them. These letters and testimony of the appellants further support the trial court's findings that no fraud or misrepresentation existed in connection with the 1944 quiet title action.

In further support of this claim of fraud appellants point out that five years after the decree quieting plaintiff Lyall's title to the real estate a subsequent action was filed. This subsequent action related to a similar provision (the fourth paragraph) of the James E. Atherton will. Although identical language was employed in the fourth paragraph it devised different land, and the action was between different parties. Plaintiff Hindman was employed as local counsel in that case but a different result was reached. In that case the judgment of the trial court was

affirmed on appeal to this court. It was held that the language of paragraph four of the will created a life estate with a vested remainder and not a fee tail estate. Wood River Oil & Refining Co. v Hadden, 169 Kan. 633, 220 P2d 154.

It is a well-established rule that when a court has jurisdiction of the parties to an action and of the subject matter and renders a judgment within its competency such judgment is final and conclusive unless corrected or modified on appeal. McFadden v McFadden, 187 Kan. 398, 357 P2d 751; In re Estate of Mullin, 201 Kan. 756, 765, 445 P2d 331.

The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to the power to decide a case rightly but includes the power to decide it wrongly.

Wycoff v. Quick Way Homes, Inc., 201 Kan. 442, 446, 441 Pac2d 886.

The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. There must be some finality in judicial decisions and it is generally held that jurisdiction includes the power to decide a case wrongly.

R may be conceded that the decision rendered in 1944 in Case No. 7807, Lynd v [illegible], et al, was erroneous in light of the Woods River Oil case but the judgment was not corrected or modified on appeal. Proof that the judgment was erroneous will not overturn the trial court's finding that no fraud was practiced in obtaining the judgment. The court's finding that no fraud was practiced is based upon substantial evidence.

Appellants predicate error upon the refusal of the trial court to grant their demand for a jury trial. The trial court determined that the issues

pertaining to the ownership of the property should be tried to the court first. Consequently, the appellants' claim for damages fell and was disposed of on a determination of the issue of ownership.

A civil litigant's constitutional right to a trial by jury (Constitution of Kansas, Bill of Rights, s. 5, and U.S. Constitution, Amendment 7) is predicated on whether the action at common law was one of law or in equity. In determining this question the court should look at the essential nature of the controversy between the parties. *Sutherland v Sutherland*, 187 Kan. 599, 602, 358 P2d 776.

This principle is reaffirmed in our statutes. K.S.A. 60-238 and K.S.A. 60-239. The trial of all jury issues demanded should be by jury unless the court upon motion, or of its own initiative,

finds that a right of trial by jury of the controlling issues does not exist under the constitution and statutes. (K. S. A. 60-239(a)(2).)

Appellants and appellees in this case sought to quiet their respective titles to this land. In Kansas quiet title actions instituted by a plaintiff in possession generally involve matters of equitable cognizance and are trinble without a jury. *Farmers State Bank v Lanning*, 162 Kan. 95, 174 P2d 69.

It is obvious from the pleadings that the controlling issue in the case concerns the validity of the the 1944 quiet title decree. Appellants' request to set aside this judgment is based upon alleged fraud in obtaining the judgment. A court derives jurisdiction to set aside a judgment by exercising its equitable powers. These equitable powers enable the court to set aside a judgment obtained by fraud. *Leslie v Manufacturing Co.*, 102 Kan.

159, 163, 169 Pac. 193; 49 CJS Judgments section 341, page 690.

It follows that relief from a judgment because of fraud originates in equity and a right to a jury trial does not generally exist on a claim to set aside the judgment. Carriag v Anderson, 167 Kan. 238, 243, 205 P2d 1004, 9 ALR2d 545; CJS Juries, section 37, 38, page 753.

Under our present rules of civil procedure a judge in the furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy may order a separate trial of any claim, counterclaim or of any separate issue. (See K. S. A. 60-242 (b), now K. S. A. 1969 Supp. 60-242 (b) as amended in 1969.)

The controlling issues tried by the court which determined the claims of all parties to this action were essentially equitable in nature. No constitutional right to a trial by jury was violated when these controlling equitable issues were separated

and tried by the court.

Appellant Morse next contends on appeal that the court did not obtain jurisdiction over certain persons in the 1944 quiet title action. He states that non-resident defendants were served only by publication service. The defendants referred to are the husbands of the daughters of George W. Atherton. It appears these husbands were residing with their wives outside the state of Kansas at the time publication service was perfected. The wives received notices of the pendency of the proceedings by registered mail.

The inchoate interest of a husband in the wife's real property declared in K. S. A. 59-505 does not include such real estate as is taken by legal proceeding prior to the death of the wife. The husband in such case is not an indispensable party to the proceeding. K.S.A. 59-505; Hostetler v.

Gonnell, 41 Kan. 392, 21 Pac. 232; Steffins v Stewart, 53 Kan. 92, 36 Pac. 55.

No specific defect in the publication service upon these defendants is pointed out and we find none. In addition we do not consider these defendants indispensable parties to the action. One spouse has no direct interest in property inherited by the other, and such spouse has no rights or liabilities in connection with litigation between sibling heirs. Rost v Heyka, 133 Kan. 292, 299 Pac. 969; Ackers v First Nat'l. Bank of Topeka, 192 Kan. 319, 387 P2d 840.

Appellant Morse contends that George W.Atherton and Hattie Atherton were indispensable parties to the action by reason of their being the sole heirs of a son who died in 1934. Whatever interest they may have inherited in the property from this son in 1934 was conveyed by warranty deed to plaintiff Lynd in 1944. They were not indispensable parties to the action.

Various other parties identified by appellant Morse as improperly omitted from the proceedings were not the "children" of James E. Atherton referred to in the sixth and eleventh paragraphs of his will. They were not contingent beneficiaries and were neither proper nor indispensable parties to the action. We are unable to find any defect in the parties joined in the 1944 quiet title action. The daughters of George W. Atherton were served individually and as representatives of a class. George W. Atherton has since died. He left no additional children of his body. All contingent beneficiaries named in the will were properly joined in the action.

Appellant Morse also attacks the findings of the trial court which appear to be based upon the plaintiffs' exhibits. These exhibits although offered in evidence were objected to by appellant.

The court reserved its rulings on the objections. The record contains nothing further concerning their admission. The court's findings of fact indicate the exhibits were considered by the court in arriving at a decision. It appears these exhibits were relevant evidence and under the circumstances they were properly considered by the court regardless of the state of the trial record. Sailor v Caldwell, 65 Kan. 86, 68 Pac. 1085; State v Bowman, 80 Kan. 473, Syl. par. 3, 103 P 84; State v Oswald, 197 Kan. 251, 255, 417 P2d 261.
No prejudicial error is shown.

Appellant Morse contends the trial court did not have jurisdiction to decide this case and argues the United States Courts have sole and exclusive jurisdiction over the real estate in question. This contention arises because of proceedings previously commenced in the United States District Court for the District of Kansas and

carried on appeal to the United States Court of Appeals, Tenth Circuit. That action concerns this same claim of the appellants to this real estate.

On October 11, 1968, The Honorable George Templar, United States District Judge for the District of Kansas, entered an order in that case (No. T-3967, Shepard, et al. v. Hindman, et al.) granting a stay of further proceedings in that court. The stay order reads in part as follows:

"One of the plaintiffs, Marvin J. Morse, has announced to this Court that a new trial is being sought from the judgment rendered against him and the other plaintiffs by the Rooks County State Court, and if the motion is overruled, that an appeal will be taken by them to the Kansas Supreme Court. Under such circumstances, it is the view of this Court that a stay of further proceed-

ings should be granted as requested by defendants Hindman and Lynd until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case. Thereafter, the Court will consider any further proceedings required by the facts and circumstances as they then appear.

"It is by the Court so ordered."

The stay order contains the reasoning and the authorities upon which it is based. We see no further reason for examination of appellant Morse's contention. The United States District Court has denied the contention that exclusive jurisdiction exists in that court. Mr. Morse now asks that we hold to the contrary. This we decline to do.

We have examined all twenty-six points raised on appeal by the appellants. Time and space will

not permit us to treat each point separately. Suffice it to say the trial court's findings are substantially supported by competent evidence appearing in the record. The appellants' claim constitutes a collateral attack upon the 1944 judgment quieting plaintiff Lynd's title to this property. The district court had jurisdiction of the parties to that action and of the subject matter. Such judgment is final and conclusive for it was not corrected or modified on appeal.

Questions raised concerning statutes of limitation and laches are therefore academic and need not be examined.

The judgment is affirmed.

In the District Court of Rooks County, Kansas

No. 9873

Charley A. Lyon and D. A. Hindman,
Plaintiffs,

vs.

Mary Catherine Shepard, et al.,
Defendant.

OPINION

At the pretrial conference in this matter some of the defendants made a request for a jury. To this request the plaintiffs and one defendant objected.

The suit was filed as a quiet title action by plaintiffs. Defendants now seek to quiet title in themselves and seek damages for having been deprived of possession.

No claim could be made for the right of trial by jury except on the damages.

Able briefs have been furnished to the Court by plaintiffs and Mr. Frank Sabatini for some of the defendants.

The Court finds that this case is not a jury matter. The defendants, by filing a cross petition, asking for a money judgment, did not change the nature of plaintiffs' cause of action.

Dated this 8th day of April, 1968.

/s/ C. E. Bisly
District Judge

Filed Apr. 8 1968

IN THE DISTRICT COURT OF ROOKS COUNTY, KANSAS

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,
vs.
MARY CATHERINE SHEPARD, ET AL.,
Defendants.
No. 9873

MEMORANDUM OPINION

This is a quiet title suit. To the petition certain of the defendants filed answers and cross petitions. The cross petitions primarily allege ownership in the property and fraud on the part of the plaintiffs.

A pretrial was held in which all of the questions of fact and of law were fully and ably presented to the Court. A question of the right to a trial by jury was raised by some defendants. The Court held that a jury would not be called except on the question of the amount of damages to which cross-petitioners would be entitled if the ownership was found to be in defendants.

The case was fully tried thereafter to the Court. The Court requested briefs to be accompanied by requested Findings of Fact and Conclusions of Law. Since the trial the Court has been furnished excellent briefs and requests. The first briefs were received in late May, and the last was received from defendant Marvin J. Morse during the week of July 22d. To this brief under the Court's order plaintiffs have a right yet to reply. However, under date of June 26, 1968, plaintiffs advised the Court that plaintiffs

The Court having found for the plaintiffs is largely adopting the requested Findings of Fact and Conclusions of Law as submitted by plaintiffs with certain amendments and deletions thought either improper or irrelevant.

Findings of Fact

1. This is an action brought to quiet the title to certain real estate situated in Rooks County, Kansas. Plaintiff Charley A. Lynd, is the owner, in possession, of the entire surface estate and an undivided 3/8th interest in the minerals and mineral estate in the following described land:

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way.

Plaintiff D. A. Hindman, is the owner, in possession, of an undivided 1/4th interest in the minerals and mineral estate in and under the above described land. The defendants are collectively the owners of an undivided 3/8th interest in the minerals and mineral estate in and under the above described land, but claim to be the owners of the entire fee simple interest in said land, which claim is asserted in answers and cross-petitions filed in this action. The original defendants in this action are the eight daughters of George W. Atherton and Hattie Atherton, deceased. During the pendency of this action, one of the daughters, Mary Catherine Shepard, died. By proper proceedings and order of the Court, her surviving children and heirs were substituted and served as parties defendant. This is an action brought to quiet or determine title under the provisions of K.S.A. 60-1002. Proper service has been made on each of the defendants and substituted defendants.

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925. The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case

No. 7783, styled *Board of County Comm.* v. *Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Athertons and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay

the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided

1/4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman*, in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by publication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet title suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1944, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is neces-

sary later for them to sign the deed, they will do that. All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5.)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance that the Lynds would convey to the Athertons 3/8th interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transactions with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered

into possession of the property and has remained in possession and has paid taxes on the surface and 3/8th of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the property in question. Oil production was first discovered on the property in 1951, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton

succeeded to the 3/8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3/8ths royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3/8th royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen (then Margaret Jewkes) executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

3. The claims of the defendants and cross-petitioners, insofar as they seek to recover any title or estate in the property greater than the 3/8th mineral and royalty estate presently vested in them by inheritance from their parents, or insofar as they seek to claim any title adverse to the present title and estate of the plaintiffs, have been barred by laches, adverse possession and the statutes of

limitation, and specifically, by the provisions of K.S.A. 60-260, 60-507 and 60-513.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7807, *Lynd* v. *Hillman, et al.*

5. The judgment in Case No. 7807 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

Dated this ..... day of August, 1968.

/s/ C. G. Birney
District Judge

In the District Court of Rooks County, Kansas

Case No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, BARBARA HILLMAN, FRANCES GFELLER, MARGARET CHRISTENSEN, ANNA ALLEY, LAURA MERRITT, ELIDA MERRITT and BERNADINE SCOTT,
Defendants.

JUDGMENT

Judgment is hereby entered in accordance with the Court's Memorandum Opinion, Findings of Fact and Conclusions of Law made and entered in this action and filed by the Clerk of the Court under date of August 5, 1968. In accordance therewith:

General judgment is entered in favor of the plaintiffs and against the defendants and each of them.

The cross-petitions and complaints of each of the defendants are denied.

The title of the plaintiff Charley A. Lynd to the ownership of the entire surface estate and an undivided 3/8ths interest in the minerals and mineral estate in the following described lands

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way,

is hereby quieted against the claims of the defendants and each of them, their heirs, successors and assigns, or any parties claiming under them.

The title of the plaintiff D. A. Hindman to the ownership of an undivided ¼th interest in the minerals and mineral estate in and under the above described land is also quieted against the claims of the defendants and each of them, their heirs, successors and assigns, or any parties claiming under them.

The defendants and each of them are hereby restrained and enjoined from claiming, asserting or setting up any right, title, interest or estate in and to the real estate hereinabove described which is inconsistent with the terms of this judgment and the right, title and estate hereby quieted in the plaintiffs Lynd and Hindman, respectively, provided that the defendants Barbara Hillman, Frances Gfeller, Margaret Christensen, Anna Alley, Laura Merritt, Elida Merritt, Bernadine Scott and Catherine Marie Ransom, Harold Alfred Morse, Ralph Leland Morse, Donald Edward Morse, Marvin James Morse, Mrs. Esther Rhaecilla Hanzen and Mrs. Shirley Yvonne Henderson are recognized to be the owners collectively of an undivided ⅜ths mineral interest for a period of twenty (20) years commencing April 12, 1944, and as long thereafter as oil and/or gas is produced from these premises or the property is being developed or operated.

The costs of this action are taxed to the defendants.

It is so ordered.

The Findings of Fact and Conclusions of Law of the Court are hereby made a part of this Journal Entry.

C. E. Birney
Judge

Filed Sept. 3rd, 1968
Irma Renner
Clerk

In the District Court of Rooks County, Kansas

No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendants.

JOURNAL ENTRY

Now to-wit on this 3rd day of September, 1968, the same being the first day of the regular September, 1968 term of said Court, and court being in due and legal session, plaintiffs appearing by Stanley Krysl of Stockton, Kansas, one of their attorneys of record, and plaintiff, D. A. Hindman also appearing in person, and no other parties appearing, matters pending herein before the Court, came regular on for hearing.

Thereupon the motion of defendant, Marvin J. Morse, to amend the Court's Memorandum Opinion and Findings of Fact, was considered by the Court.

Thereupon the Court announced that it had studied this motion in advance of this hearing.

Thereupon the Court finds and decrees that said motion should be, and the same is overruled.

Thereupon, the Journal Entry of Judgment, prepared by counsel for plaintiffs, was submitted to the court, together with evidence in the form of letters advising that Frank Sabatini, attorney for some of the defendants, had declined to approve said Journal Entry because the Court's Findings of Fact and Conclusions of Law were not included, and that a copy of said Journal Entry had been mailed to Marvin J. Morse, under date of August 12, 1968, by plaintiffs'

counsel with letter advising that if he had any objections to the form thereof to file said objections within ten (10) days from said date.

Thereupon said Journal Entry was considered by the Court.

Thereupon the Court finds and decrees that no objections had been filed by Marvin J. Morse and that said Journal Entry should be approved by the court, subject that the following be added at the end thereof, viz: "The Findings of Fact and Conclusions of Law of the Court are hereby made a part of this Journal Entry."

Filed Sept. 5, 1968

Thereupon the aforesaid language was added to said Journal Entry and the same was approved by the Court and signed by the Judge thereof, and filed with the Clerk.

Judge

In the District Court of Rooks County, Kansas

No. 9873

D. A. Hindman and Charley A. Lynd,
Plaintiffs,

vs.

Mary Catherine Shepard, et al.,
Defendants.

JOURNAL ENTRY
(Overruling Motion for New Trial)

Now to-wit on this 4th day of October, 1968, the same being an adjourned day of the regular September, 1968 term of said court, and one of the regular designated motion and court days thereof, the motion of Marvin J. Morse for a new trial came regular on for hearing; plaintiffs appearing by their attorney, Stanley Krysl of Stockton, Kansas, and plaintiff, D. A. Hindman, also appearing in person, and no other parties appearing.

Thereupon, said motion was presented to the Court by the attorney for plaintiffs.

Thereupon, the Court announced that it had studied said motion in advance and was prepared to rule thereon.

Thereupon the Court finds that said motion should be overruled.

It is therefore by the Court considered and ordered that said motion be, and the same is overruled.

Judge

O.K. Stanley Krysl,
Attorney for Plaintiffs

Filed Oct. 14 1968

In the District Court of Rooks County, Kansas

No. 9873

D. A. Hindman and Charley A. Lynd,
Plaintiffs,

vs.

Mary Catherine Shepard, et al.,
Defendants.

JOURNAL ENTRY

Now to-wit on this 13th day of January, 1969, the same being an adjourned day of the regular January, 1969 term of said court, and one of the regular designated motion days thereof, plaintiffs appearing by one of their attorneys of record, Stanley Krysl of Stockton, Kansas, plaintiff, D. A. Hindman appearing in person, and defendant, Marvin Morse, also known as Marvin James Morse and Marvin J. Morse, appearing in person and representing himself, and no other parties appearing, the above entitled matter came regularly on for further proceedings.

Thereupon, Defendant Marvin James Morse presented his motions to vacate and set aside all orders, findings, conclusions and judgments and motion to dismiss for lack of jurisdiction.

Thereupon, said motions were orally argued by the parties present and the court being fully advised in the premises, and after due consideration, finds that said motions to vacate and set aside all orders, findings, conclusions and judgments and motion to dismiss for lack of jurisdiction should be overruled.

It is so ordered by the Court.

s/C. E. Birney
C. E. Birney
Judge

Approved s/ Stanley Krysl,
Stanley Krysl
Stockton, Kansas
Attorneys for Plaintiff.

s/ Marvin J. Morse
980 Barkley Ct.
Pinole, California
Pro-Se Defendant

In the Supreme Court of the State of Kansas

No. 45,622

D. A. Hindman and Charley A. Lynd,
Appellees,

vs.

Mary Catherine Shepard, et al.,
Appellants.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant to dismiss for lack of jurisdiction.
Motion by Appellant to dismiss appeal, DENIED.

Yours very truly,

James R. James
Clerk, Supreme Court

Date January 29, 1969

A-49

IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Thursday, June 4, 1970

No. 45,622

D. A. Hindman and Charley A. Lynd, Appellees,	)	
	)	Motion by
	)	Appellant
v.	)	Marvin J. Morse
	)	for rehearing is
Mary Catherine Shepard, et al., Appellants.	)	Considered and
	)	DENIED
	)	

SUPREME COURT OF THE UNITED STATES

No._____October Term, 1970

MARVIN J. MORSE, ET AL.,

Appellants,

-vs-

D. A. HINDMAN, ET AL.,

ORDER

UPON CONSIDERATION of the application of the appellants,

IT IS ORDERED that the time to docket an appeal in the above-entitled case be, and the same is hereby, extended to and including November 1, 1970.

s/ BYRON R. WHITE
Associate Justice of the
Supreme Court of the
United States

Dated this 24th
day of August, 1970.

In the United States District Court
for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, and MARGARET CHRISTENSEN, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

D. A. HINDMAN; CHARLEY LYND, et al.,

Defendants.

RULING ON SPECIAL ISSUE OF CLASS ACTION

Plaintiffs Shepard and Christensen, two of eight surviving children and heirs at law of George W. Atherton, now deceased, brought this action in this Court against defendants Hindman, Lynd and owners of leasehold and mineral interests in certain described real estate in Rooks County, Kansas.

The two plaintiffs are non-residents of Kansas and diversity of citizenship appears to exist between them and the named defendants. The problem here arises because plaintiffs allege in their complaint that the action is maintained as a Class Action on behalf of themselves and six of their sisters, all of whom, they allege, are remaindermen entitled to the real estate described in the complaint by virtue of the provisions of the Will of their grandfather, James E. Atherton, deceased.

It appears that three of the remaindermen are residents of Kansas and defendants contend that the effort to maintain this as a Class Action is for the purpose of circum-

venting the jurisdiction of the state court and to use such device as a subterfuge for obtaining federal jurisdiction in this court.

Initially the Court determines that less than all tenants in common in real estate, situated in Kansas, may maintain against third parties an action in ejectment, or forcible entry and detainer or to establish his or her undivided interest in the real estate. *Holt v. King*, 250 F.2d 671.

The defendants Hindman and Lynd and some of the owners of leasehold or mineral interests raise the special defense that

> "some of the persons alleged in the complaint to be members of the class plaintiffs claim to represent, are citizens of the State of Kansas. This action is not truly or properly a class action; the complainants are not too numerous and it is not impracticable for them to join as plaintiffs in an action against the defendants; nor can the present plaintiffs fairly insure adequate representation of the non-party complainants. This action is cast as a class action for the purpose of wrongfully and improperly conferring jurisdiction on the United States District Court."

The proposition must be considered under the applicable provisions of Rule 23 which was amended, effective July 1, 1966. The Court believes that the issue must be determined from a consideration of paragraph (a) of the rule which reads:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

It appears from the record that there are only eight contingent remaindermen who could have claims against the real estate which is the subject of the action here. All are known, their places of abode are known. While it is asserted in the complaint that it is impracticable to bring them into court, there is no allegation of fact from which such a determination can be made, nor does the record establish such fact.

Rule 23 requires that one or more members of a class may sue as a representative party *only* if the class is so numerous that joinder of all the members is impracticable. While it may be conceded that there are questions of law or fact common to the class, and the claims of the representative parties are typical of the claims of the class, (though this is denied) and the representative parties could fairly and adequately protect the interests of the class, the plaintiffs do not allege, nor does it affirmatively appear, that "the class is so numerous" that joinder of all members is impractical. Plaintiffs contend that multiplicity of actions may be avoided by permitting the maintenance of this as a class action because other remaindermen would have to file separate actions in the place of residence of each, and that this would therefore be impractical. This contention cannot be sustained because the action to recover an interest in real estate, as here, is in the jurisdiction where the property is located. Actions in other jurisdictions would not be maintainable. See authorities cited and rule stated in 36 C.J.S. p. 133 Title Federal Courts, Section 25(1).

It is said that the size of the group sufficient to justify a class action is relative according to the situation as it exists and is a matter of judicial discretion. *Rank v. Krug*, 90 F.Supp. 773, 804.

The sufficiency of numbers in a class considered adequate to sustain a Class Action has been considered by this Court. In *Coffman v. City of Wichita*, 165 F.Supp. 765, opinion adopted by Tenth Circuit Court of Appeals, 261 F.2d 112, where it appeared that the owners of seven of eighteen tracts involved in the class joined on behalf of themselves and of the group, each of which were the owners of separate tracts of property to obtain a declaratory judgment as to the validity of certain eminent domain proceedings. The Court in its opinion said:

> "Assuming, without deciding, that there are common questions of law and fact, there is one requirement which all of the above types of classes must meet. That is, that the number involved in the class must be 'so numerous as to make it impracticable to bring them all before the Court. . .' Rule 23, F.R.C.P.28 U.S.C. There are eighteen tracts involved in this group, the owners of seven of which have joined individually. Under the facts of this case, it is concluded that this is not a spurious class action in which the parties are so numerous as to render it impracticable to have them before this Court."

The Court is aware that under the amended rule the categories of class actions have been eliminated but the application of the rule in respect to the requirement that the number involved in a class must be so numerous as to make it impracticable to bring them all before the Court has not been modified in any respect.

This rule announced is consistent with that in the case of *Jackman v. Union Pacific*, 4 F.R.D. 172, where it was said:

> "The plaintiff is able to name each of the seven other heirs of the decedent. There is no reason why

these interested parties should not be brought into court and made parties plaintiff. The plaintiff is not confronted with an impracticable situation. It was not the design of the rule to permit class actions as the facts are presented here. Moreover, there is no averment or an assignment of a reason why all the heirs are not made parties plaintiff."

The special defense that the members of the class are not sufficiently numerous to support the maintenance of this action as a class action is well taken. The Court cannot under the circumstances say that the class is so numerous that the joinder of all the members is impracticable, particularly when plaintiffs may individually prosecute this action for the protection or recovery of their alleged interests or rights in the real estate involved.

Plaintiffs have requested that in the event this defense is sustained that they be permitted to amend their petition (complaint) so as to maintain this action for themselves individually. This request is granted and leave is given to so amend the complaint, labeled as a petition, within ten days.

It is so ordered.

Dated at Topeka, Kansas this 21st day of October, 1966.

/s/ GEORGE TEMPLAR

United States District Judge

Filed Oct. 21, 1966

In the United States District Court
for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, and MARGARET CHRISTENSEN, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

D. A. HINDMAN; CHARLEY LYND, et al.,
Defendants.

ORDER DENYING INJUNCTION TO STAY PROCEEDINGS

The plaintiff, Margaret Christensen, filed a motion in this Court on April 27, 1967 requesting the Court for an order pursuant to 28 U.S.C. 2283 enjoining any and all further proceedings in the cause captioned D. A. Hindman and Charley Lynd v. Mary Catherine Shepard, et al, No. 9,873 now pending in the District Court of Rooks County, Kansas until such time as this cause shall have been determined and concluded and the plaintiff's rights fully adjudicated. Plaintiff Christensen alleges in support of her motion that this action was filed and service obtained upon defendants herein prior to the filing by them of the action in the District Court of Rooks County, Kansas, which cause involves issues and subject matter in common with this cause.

Counsel for the interested parties have filed well prepared briefs supporting their respective contentions with respectable authorities cited.

The action pending here is brought to recover money damages against certain of the defendants and at the same

time to obtain a determination that certain conveyances and a quieting title judgment rendered by a state court be held void as a basis for the action to recover money damages, and it is further maintained for the purpose of enjoining defendants from extracting minerals from the premises described and to eject them from the same and for the further purpose of having plaintiff's title quieted to the property involved.

In a brief filed on their behalf, some defendants suggest a better solution to the problem of concurrent jurisdiction of the matters and issues involved between the parties here would be to stay proceedings in this Court. The Court is attracted by the suggestion but cannot sustain it.

After reviewing the file, the briefs and considering the arguments and statements of counsel, the Court is of the view that at most, this Court must exercise its discretion in ruling upon the motion to stay proceedings in state court, and though some duplication of effort may arise if the motion is denied, this Court should, taking into account the applicable law, the federal statutes controlling, and all of the facts and circumstances, at this time deny and overrule the motion.

It is so ordered.

Dated at Topeka, Kansas this 31st day of July, 1967.

/s/ GEORGE TEMPLAR

United States District Judge

Filed July 31, 1967

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action is being maintained by Marvin J. Morse and others to determine and establish their interest in certain real estate located in Rooks County, Kansas, and described as:

> All that portion of Section 32 lying sough of the Union Pacific Railroad right-of-way in Township 9 south, Range 19 west of the 6th P.M., consisting of 333 acres, more or less.

This property was subject to a devise under the will of James E. Atherton, deceased, which was admitted to probate on August 4, 1925. By its terms, the will gave the property in question to George W. Atherton "to be held by him and for his use during his natural lifetime, provided he pay the taxes as they become due and payable on the same. . . . After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above-described real estate shall descend to the children of his body and that the same be held by them and for their

use for a period of twenty years from the time of the death of the said George W. Atherton, after which the said children of my son George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

Another provision of the will stated in substance that, "Should any one of my children (naming them) after coming into possession of the use of their respective lands, refuse to pay the taxes on the same . . . it is my will and I hereby direct (that he) . . shall be deprived of any benefit whatever under this will and that the proceeds of the property which shall go to such offending person shall go to the other of my said children upon the payment of the taxes."

It appears that sometime after the death of James E. Atherton, his son George W. Atherton had taken possession of the real estate so devised to him, and that he had not been able to pay the taxes on the land. It further appears that he made a deal of some kind, the full details of which have not been completely established but which resulted in a deed being given to one Charley A. Lynd by George W. and Hattie Atherton, his wife, on February 11, 1944. The property was redeemed from tax foreclosure by Lynd and he thereafter instituted an action to quiet the title to the property so conveyed. Plaintiffs attack the effectiveness of this quiet title action, contending the judgment is completely void because certain indispensable parties were not joined in the action. After Judgment was rendered in this action (No. 7807) quieting title in Charley A. Lynd, on April 12, 1944, Charley A. Lynd conveyed to D. A. Hindman, a one-fourth interest in the oil and gas under the property and a three-eighths interest of the oil and gas to George and Hattie Atherton, his wife.

Thereafter, several events took place which are not of significance here, but about November 24, 1959, D. A. Hindman and wife, Charley A. Lynd and wife, and George W. Atherton and wife, executed oil and gas leases to one Albert A. Austin, the predecessor in title to holders or present leasehold interests in the property. Production of mineral was established and continues to be produced under these leases.

Several other interests have been created by conveyances from Lynd granting easements to pipeline companies, which companies are parties to this action.

Plaintiff, Marvin J. Morse, now presents to the Court his motion for summary judgment on the grounds that no genuine issue as to any material fact exists and that plaintiff is entitled to a judgment as a matter of law.

There are numerous defendants in this case, consisting of, among others, Charley A. Lynd, D. A. Hindman, the oil and gas lessees, mortgagees, holders of pipeline easements, and other parties claiming an interest by virtue of the oil and gas leases mentioned above.

Basically, various defendants contend:

(1) That the quiet title action in 1944 (Case No. 7807), maintained by Charley A. Lynd, barred plaintiffs from any interest in the property;

(2) That the statute of limitation bars plaintiffs' claims;

(3) That defendants are bona fide purchasers without notice of any claims, and that plaintiffs must be estopped to assert any interest in the property.

There are likely other issues to which the Court has not had its attention called, but plaintiffs' theory appears to be that a contingent remainder existed in them or their ancestor which has never been extinguished and which gives them an unfettered interest in the property which they now

endeavor to establish and from which they seek to exclude defendants. Other contentions seem possible, but generally speaking, this is the background of the case.

In considering motions for summary judgment, the Court must bear in mind the rules applicable. Where a party moves for summary judgment, he has the burden of establishing the lack of any material triable issue of fact by the record before the Court even though the opposing party would at trial have the burden of proof on the particular issue. Summary judgment is only appropriate where the case is so free from doubt as to render a formal trial useless. Inferences that may be drawn from all the facts before the Court should be viewed in a light favorable to the party opposing the motion. *Bolack v. Underwood,* 340 F.2d 816, (10 CA).

Furthermore, this Court was admonished in the case of Shehi v. Southwestern Bell Telephone Company, 382 F.2d 627, that summary judgment precludes an original finding of fact or the establishment of permissible inferences from undisputed facts and must flow only as a matter of law from undisputed facts. It is enough to say that the grant of summary judgment is improper where a case presents genuine issues as to material facts which the Court cannot say are free from doubt. *Morrow v. Spiess,* 349 F.2d 931, (10 CA); and see the case of *U.S.A. v. Cook,* T-3792, 4-13-66, unreported.

This Court cannot say from the disputed facts before it that the quieting title judgment is totally void; that the statute of limitation has run; that plaintiffs have remaindermen's interest in the property which they are entitled to preserve and eject defendants from any interests therein; nor can the Court say that as a matter of law defendant

oil and gas lessees were not purchasers for value, in good faith, without notice. These issues are not so free from doubt that the Court may say plaintiffs are entitled to judgment as a matter of law.

Plaintiff, in his motion for summary judgment, requests that if summary judgment is not rendered in his favor upon the whole case, or for all the relief asked, and a trial is necessary, that the Court, at the hearing on the motion by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually, and in good faith, controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action as are just.

The Court must rule that plaintiff's motion for summary judgment should be denied. Plaintiff's suggestion that the Court define the issues that may remain and ascertain what material facts are in good faith controverted are matters that should be properly taken up before the Court under F.R.Civ.P., 16, which sets forth the pretrial procedure designed to accomplish the purpose suggested by plaintiff in his motion for summary judgment. At pretrial, these matters will be considered as the rule authorizes.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that plaintiff's motion for summary judgment filed on June 3, 1968, (Doc. 165), be, and the same is hereby, denied and overruled.

Dated at Topeka, Kansas, this 3rd day of July, 1968.

/s/ GEORGE QEMPLAN
United States District Judge

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER

On this 9th day of September, 1968, this matter came on for hearing before the Court,

First, upon the motion of plaintiff, Marvin J. Morse, to vacate the order of this Court entered March 8, 1968, refusing to enjoin the parties from proceeding in an action then pending before the Rooks County, Kansas District Court;

Second, upon the motion of defendants, D. A. Hindman and Charley A. Lynd, to stay proceedings in this Court pending the outcome of the action in the Rooks County, Kansas District Court.

Thereupon, the Court, after hearing arguments and statements of counsel and upon being fully advised in the premises, finds that plaintiff's motion to vacate and set aside the order of this Court entered March 8, 1968, should be denied.

It is so ordered.

Thereupon, the Court considered the motion of defendants, Hindman and Lynd, to stay further proceedings between the parties in this Court, and the Court, after fully considering the evidence submitted and the arguments and

statements of the parties and the counsel, finds that such motion should be taken under advisement, that defendants should be granted ten days to file a brief in support of their motion, and that plaintiff should be granted ten days' time thereafter within which to file reply briefs.

It is so ordered.

/s/ GEORGE TEMPLAR
United States District Judge

Filed September 25, 1968

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER GRANTING STAY

This action was first initiated in this Court when plaintiffs Mary Catherine Shepard and Margaret Christensen filed on March 3, 1966, a class action on behalf of themselves and other remaindermen under the provisions of the will of James E. Atherton, deceased, as a class. The action was brought to establish the rights of plaintiffs in described real estate in Rooks County, Kansas; to set aside deeds conveying interest in the property to defendants Hindman and George W. Atherton and Charley Lynd; declaring a quiet title judgment rendered in case number 7807 by Rooks County, Kansas District Court to be void; setting aside deed from Margaret Christensen to George W. Atherton; and praying money damages, actual and punitive, against defendants Lynd and Hindman; and also praying ejectment of oil and gas lessees and others claiming an interest in the property.

Defendants challenge the right of plaintiffs to maintain the suit as a class action and the Court on October 21, 1966, sustained defendants' special defense that members of the class were not sufficiently numerous to support the maintenance of a class action, but the Court, at that time, granted leave to plaintiffs to file an amended complaint

for themselves individually. On November 1, 1966, an amended complaint was filed by the same plaintiffs, as individuals, seeking substantially the same relief originally prayed for.

In the meantime, defendants Hindman and Lynd had instituted an action in the District Court of Rooks County, Kansas against Mary Catherine Shepard and other persons claiming an interest in the same real property. The determination of the rights and interests of the respective parties in that real estate is the basis of plaintiffs' suit in this Court. On plaintiffs' application, numerous holders of mineral interests in the land were made defendants in this Court and demands for an accounting were sought from each of such defendants, together with a prayer that they be excluded from any interest in the property about which the litigation is involved.

This Court has denied applications of plaintiffs to enjoin defendants from proceeding with the quiet title action in the Rooks County State Court. During the pendency of this action, plaintiff Mary Catherine Shepard died, and the action has been revived in the names of her successors in interest.

The case was placed on the September 9, 1968 Pre-Trial Calendar of the Court, and prior to that time, plaintiffs on September 3, 1968, filed a motion again seeking to enjoin defendants Hindman and Lynd from proceeding in the state court with the action they had instituted there and requesting this Court to vacate the order it had entered denying an injunction to enjoin parties from proceeding with the action in the state court. This motion the Court denied.

On September 4, 1968, defendants filed a motion to stay proceedings in this Court and offered in support of the motion a certified copy of a judgment supported by duly

certified copies of Findings of Fact and Conclusions of Law entered by the District Court of Rooks County, Kansas on September 3, 1968, purporting to quiet the title of the defendants here against the plaintiffs to the described real estate, the subject of the litigation before this Court.

The Court heard this motion on September 9, 1968, and received in evidence certified copies of the Findings and Conclusions and the Judgment entered September 3, 1968 by the Rooks County State Court.

It appears from the evidence submitted that the state court did render a judgment as claimed by Hindman and Lynd quieting their title to the land against plaintiffs here and that the judgment is final. The adjudication of the state court of the issue of ownership in the real estate here involved is determinative of the rights of all the parties to that property. It was said in the case of *Mandeville v. Canteburg*, 318 U.S. 47, 49:

> "But where the judgment sought is strictly in personam for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other."

Again, in *Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17 (2nd Cir.), that court set forth the applicable rules as follows, p. 19:

> "The well established rule is that a federal court is not required to abate the normal in personam action on a plea of a pending action in a state court. . . . Had this case been initiated as a civil action rather than by arbitration, it would have been a simple contract action, with none of the in rem characteristics which required the application of a different rule in such

> cases. . . . In such cases, it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings."

And, in *Princess Lida* v. Thompson, 305 U.S. 456, the following principle was stated:

> "Where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."
>
> "But if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other."

This principle was sustained in the Tenth Circuit by the case of *Brinkley* v. *Hassig, et al.*, 83 F.2d 351.

There is another aspect of the case to which reference should be made. A judgment rendered by a state court of competent jurisdiction is entitled to full faith and credit in all federal courts and bars an action in a federal court on the same cause between the same parties. A state court judgment, operating as a merger and extinguishment of the original claim or demand, will bar an action in a federal court on the same cause of action between the same parties or their privies. If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. The judgment of the state court will be conclusive as to all points and questions actually put in issue and decided in the action in the state court. See 50 C.J.S., *Judgments*, § 800, and at § 939 of the same treatise, we find the general statement of applicable law that the principle of res judicata is applied as between

federal and state courts; and where suits on the same cause of action are pending simultaneously in a state court and in a federal court, a final judgment entered in either court will be binding and conclusive in the other, regardless of which suit was first commenced.

Presumably the judgment rendered by the Rooks County District Court, excluding plaintiffs here from any interest in the property involved, is a valid and enforceable judgment. If it is not vacated or reversed, the causes of action in the federal and state courts being substantially the same, the judgment will be conclusive on all points and questions actually put in issue and decided in the action in the state court as between the parties and their privies. See cases cited in 50 C.J.S., *Judgments*, § 930, p. 522.

One of the plaintiffs, Marvin J. Morse, has announced to this Court that a new trial is being sought from the judgment rendered against him and the other plaintiffs by the Rooks County State Court, and if the motion is overruled, that an appeal will be taken by them to the Kansas Supreme Court. Under such circumstances, it is the view of this Court that a stay of further proceedings should be granted as requested by defendants Hindman and Lynd until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case. Thereafter, the Court will consider any further proceeding required by the facts and circumstances as they then appear.

It is by the Court so ordered.

Dated at Topeka, Kansas, this 11th day of October, 1968.

/s/ GEORGE TEMPLAR

United States District Judge

Filed Oct. 11, 1968

DO NOT PUBLISH

Appendix

In the United States Court of Appeals
Tenth Circuit

September Term, 1969

MARVIN J. MORSE,
Plaintiff-Appellant,

and

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

v.

D. A. HINDMAN, et al.,
Defendants-Appellees.

No. 20-69

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D. C. T-3267)

George B. Powers and Benjamin C. Lange, filed a motion to dismiss appeal for defendants-appellees Tomlinson-Kathol, et al.

Richard Jones filed a motion to dismiss appeal for defendant-appellee Mobil Pipe Line Company.

Thomas C. Triplett filed a motion to dismiss appeal for defendants-appellees Charley Lynd, Elida Lynd, D. A. Hindman and Pauline Hindman.

Before MURRAH, Chief Judge, and PICKETT, Circuit Judge.

PER CURIAM

Plaintiff seeks to appeal from "each and every adverse finding, ruling, order and decision" entered in this proceeding by the district court. Defendants move to dismiss the appeal on the grounds that the notice of appeal is untimely as to all save one of the orders enumerated therein, and that the remaining order is not appealable.

The most recent order of the district court in this case, that which prompted this appeal, was entered October 11, 1968, staying further proceedings to await the finality of a state court judgment entered September 4, 1968. That judgment determined the title to certain property in Rooks County, Kansas, ownership of which was claimed by plaintiffs in this case, and upon which their other claims for relief depended. The notice of appeal herein was filed October 25, 1968.

We agree that the notice of appeal is timely only as to the stay order of October 11, 1968. Rule 4(a), F.R.A.P., requires that a notice of appeal be filed within thirty days from the date of the judgment or order appealed from. It provides further that a "judgment or order is entered within the meaning of the subdivision when it is entered in the civil docket." The order plaintiff recites as having been made September 25, 1968, was entered in the docket September 9. Assuming solely for argument that that and all earlier orders are final and appealable, the notice is untimely and we may not consider them.

The stay order of October 11 is not itself a final and appealable order. In *Ephraim Freightways, Inc., v. Red Ball Motor Freight, Inc.*, 376 F. 2d 40 (10th Cir. 1967), this court stated:

> "It is apparent that the order denying the motion to stay is not a final decision under 28 U.S.C. Section 1291. Therefore, the order is appealable, if at all, only as an interlocutory order refusing an injunction under 28 U.S.C. Section 1292 (a)(1). . . . It has been made clear in a series of United States Supreme Court decisions that an order staying or refusing to stay proceedings in the United States District Court is appealable as an interlocutory injunction only if the action in which the order was made is essentially an action at law and the stay was sought to permit the prior determination of some related equitable matter. [Citations omitted.]" 376 F. 2d at 41.

Here, as in that case, although plaintiffs claim damages, the relief sought is principally equitable in nature; a quiet title judgment, an accounting, and imposition of a trust upon certain funds. The first prerequisite for entertaining the appeal from the stay order is entirely lacking, i.e., that the action stayed be essentially an action at law. See also *Jackson Brewing Co. v. Clarke*, 303 F. 2d 844 (5th Cir. 1962). *See Annot.*, 18 A.L.R. 3rd 460.

The motions of defendant-appellees are granted and the appeal is dismissed.

Filed September 17, 1969

In the United States Court of Appeals
Tenth Circuit

September Term, 1969. September 17, 1969

Before MURRAH, Chief Judge, and PICKETT, Circuit Judge.

Marvin J. Mann, *Plaintiff-Appellant,* and Mary Catherine Simpson, et al., *Plaintiffs,* v. D. A. Hinsman, et al., *Defendants-Appellees.*	No. 69-69

Upon consideration of the motions to dismiss it is ordered that motions be and are hereby granted. The appeal is dismissed.

William L. Whittaker
Clerk

By /s/ RUTH H. JACOBSON
Deputy Clerk

September Term, November 12, 1968.

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

Marvin J. Morse,

Petitioner,

vs.

The District Court of Rooks County, Kansas; The Honorable C. E. Birney, Judge of the Thirty-Fourth Judicial District of Kansas and presiding judge of The District Court of Rooks County Kansas; D. A. Hindman and wife Pauline; Charley A. Lynd and wife Elida; Margaret Christensen; Bernadine Scott; Anna Alley; Barbara Hillman; Elida Merritt; Laura Merritt; Francis Gfeller; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Rhaecilla Hannen; Catherine M. Ransom; Shirley Y. Henderson, Attorneys Tom Triplett and Robert Martin; Stanley Kryzl; Frank Sabatini; Joel Sterrett and Lawrence Munns,

Respondents.

No. 15748

By his application for a writ of prohibition and, in the alternative, an injunction, the petitioner seeks to stay proceedings in a Kansas state court. A suit was brought in the federal court apparently involving some of the parties to the state suit and some, or all, of the issues. The federal court refused to stay the state court proceedings and denied a motion for summary judgment.

Section 2283, 28 U.S.C., says that a federal court may stay state court proceedings when necessary in aid of its

jurisdiction or to protect its judgments. Here the federal district court has determined that the injunction is not needed in aid of its jurisdiction. We find nothing in the papers to show that in so acting the district court abused its discretion. That court has entered no judgment which must be protected.

The application for a writ of prohibition and for an injunction are severally denied.

A true copy

Teste

William L. Whittaker
Clerk, U.S. Court of
Appeals, Tenth Circuit

[Seal]

/s/ Helen R. Barthu
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF KANSAS

WOOD RIVER OIL & REFINING CO., Inc.,

v.

KADDEN et al.

No. 37,972
July 8, 1950
169 Kan. 633
220 Pac2d 154
Rehearing Denied August 22, 1950

Mark H. Adams and William I Robinson, both of Wichita, argued the cause, and Charles E. Jones, J. Ashford Hinkle, Addison I. West, and O. A. Witterman, all of Wichita, and Robert Osborn, of Stockton, were with them on the briefs for the appellant.

A. W. Hershberger and Richard Jones, both of Wichita, argued the cause, and J. B. Patterson, Wm. P. Thompson, and H. E. Jones, all of Wichita, and D. A. Hindman of Stockton, were with them on the briefs for the appellees and cross-appellants.

Glenn V. Bunker, of Russell, argued the cause and was on the briefs for appellees M. W. Patrick Barkley and Emily Barkley.

WERTZ, Justice.

This action was instituted by appellant Wood River Oil & Refining Co., Inc., to quiet its title to an oil and gas lease covering certain described real property in Rooks County, Kansas, and to

construe a will. All appellees, defendants in the original action, filed cross-petitions seeking to establish interests in the property and to quiet their titles thereto.

The following facts gave rise to this action. J. E. Atherton, also known as James E. Atherton died testate on July 21, 1925, owning considerable real estate in Rooks County, Kansas. His will was admitted to probate in Rooks County on August 4, 1925. By his will, J. E. Atherton devised all of his property to his wife, Mary L. Atherton, for life. The testator then by identical provisions in his will provided for the disposition of seven separate pieces of real property, including that involved in this action, to four of his children and three of his grandchildren. In this action we are concerned primarily with the fourth paragraph of the will, which reads as follows:

"Fourth: I give, devise and bequeath to my

son, Orian Louis Atherton of Alva, Oklahoma, to be held by him and for his use, during his natural life time, provided he pays the taxes as they become due and payable on the same, the following described land (describing it). After the death of my son, the said Orian Louis Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them for their use for a period of twenty (20) years from the time of the death of the said Orian Louis Atherton, after which time the said children of my son, Orian Louis Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The widow, Mary L. Atherton, on August 4, 1925, elected to take under decedent's will, and the estate was duly administrated and closed

many years ago. The will and the order admitting it to probate have never been contested in any manner. When testator died, his son Orian Louis had six children, Lillie May Atherton Barkley, Orian Louis Atherton, Jr., Julia Stallings, Claudia I. Sanders, Mary L. Dunlap, and Nellie Capreau. Lillie May Barkley died intestate August 10, 1934, leaving as her sole heir her husband, M. W. Patrick Barkley. On January 5, 1949, Orian Louis Atherton, widower, executed and delivered to plaintiff (appellant) an oil and gas lease covering the land involved in this action, which lease was duly recorded on January 26, 1949. On January 18, 1949, Orian Louis Atherton executed and delivered to Ed. F. Madden an oil and gas lease on the same land, which was recorded the same day, as also were leases to Madden from all the living children of Orian Louis Atherton together with their spouses, and a lease executed

by O. L. Atherton as trustee for his children yet unborn covering this land. Orian Louis Atherton died on May 12, 1949, leaving the five children above named surviving him. This action was filed on June 10, 1949, against Madden and co-owners of his lease, Milo Sidwell, C. G. Drilling Co. Inc. and C. F. Glaason, the five children of O. L. Atherton then living and their spouses, and M. W. Patrick Barkley, husband of the deceased daughter and her sole heir. Barkley, intervenor, filed an answer and cross-petition claiming title to one sixth interest in the real estate involved by inheritance from his wife. The case was tried on September 17, 1949, and on November 26, 1949, the trial court entered its judgment holding that under the will of James E. Atherton, Orian Louis Atherton was devised a life estate with a vested remainder in his six children in being at the time of the death of James E. Atherton; quieted the

title to an undivided one-sixth interest in the property in each of the five children of Orian Louis Atherton then in being, subject to the oil and gas leases executed by them in favor of Ed. F. Madden and his assigns; and quieted title to an undivided one-sixth interest in said property in M. W. Patrick Barkley free of any oil and gas lease here involved. This appeal followed.

Error is charged in failure of the court to determine that under the will of James E. Atherton, a fee tail estate in the land in question was devised to Orian Louis Atherton; that the oil and gas lease executed by Orian Louis Atherton, the tenant in tail, in favor of appellant is binding upon the issue in tail, the persons who, on the death of Orian Louis Atherton, came into possession of the real property covered by said lease; and in holding that neither the case of Atherton v. Ritchie, et al., nor the case of Lynd v Hillman,

et al., both tried in the district court of Rooks County, is res adjudicata of any of the material facts and issues in this case.

Defendant appellees and cross appellants, with the exception of the Barkleys, charge that the lower court erred in holding the case of Atherton v Ritchie, et al., was not res adjudicata; in holding that the interests of the children of the body of Orian Louis Atherton by the will of James E. Atherton vested on the death of James E. Atherton in those of the aforesaid children living at that time; and in holding that M. W. Patrick Barkley was the owner of an undivided one-sixth interest in the land in question.

Determination of this lawsuit involves the interpretation and construction of paragraph four of the J. E. Atherton will. It is elementary that the cardinal consideration in construing a will is the intention of the testator. The test of that in-

tention is the language contained in the four corners of the instrument, and circumstances surrounding its execution if they are needed to clarify the testator's true intent and purpose. If the testator's intention can be reasonably ascertained it will be judicially declared and executed unless contrary to law or public policy. *In re Estate of Works*, 168 Kan. 539, 213 P2d 998; *In re Estate of Chevalier*, 167 Kan. 67, 204 P2d 748; *Estate of Thompson*, 161 Kan. 641, 171 P2d 294; *Shannep v Strong*, 160 Kan. 206, 160 P2d 683.

With these principles in mind we may now turn to the instrument that is the subject matter of this suit.

Our first inquiry is as to the nature and character of the estate taken by Orian Louis Atherton. An examination of the material portion of the first part of paragraph four will be helpful. Deleting unimportant words, that part reads:

"I give, devise and bequeath to my son * * * to be held by him and for his use, during his natural life time * * *." These are words of limitation. They clearly indicate that Orian Louis was to enjoy only the use of the property during his life time. The controlling portion of paragraph four, however, is the last part thereof beginning with "After the death of my son" and may be paraphrased as follows: "the said real estate shall descend to the children of his body and the same shall be held by them and for their use for a period of twenty years from the demise of Orian Louis Atherton, after which time the said children shall come into full possession of the said real estate and may hold the same or dispose thereof in any manner they wish."

It is conceded by all parties that the testator's attempt to delay his grandchildren's enjoyment of their interest for twenty years is ineffective be-

cause no defeasance on breach is provided. However, the language attempting to delay the grandchildren's full enjoyment may be considered in determining the intention of the testator. The void provision has nothing to do with the vesting of the estate; it refers only to possession. It is to be noted that testator's attempted restriction in no way limited the manner of the grandchildren's holding or the character of their estate. They were granted absolute and complete power of disposition. The language of the instrument under consideration compels us to conclude that the ultimate fee to the land in question was in the children of Orian Louis, and that the latter took only a life estate.

The appellants contend, however, that paragraph four creates an estate tail. An acceptable definition of an estate tail is to be found in *Gardner v Anderson*, 116 Kan. 431, 227 P. 743:

"An 'estate tail' or 'fee tail' is a freehold estate in which there is a fixed line of inheritable succession, limited to the issue of the body of the grantee or devisee, and in which the regular and general succession of statutory heirs at law is cut off." For other definitions of estates tail see *Coleman v. Shoemaker*, 147 Kan. 689, and cases cited therein. Where there is an estate tail the line of succession continues from generation to generation until the line of inheritable succession is broken by conveyance or failure of issue. In this case J. E. Atherton, by placing the fee in his grandchildren, severed the line of inheritable succession at its inception. His will provided the grandchildren were to come into full possession and might dispose of the property in any manner they wished.

A devise similar to that in paragraph four was before the court in *Brann v. Hall*, 141 Kan.

749, 750, 43 P2d 229.

In that case the devise was in the following words: "I hereby give and devise unto my son • • a life estate only • • • ; after the • • death of my said son • • • I give and devise, unto the lawfully begotten issue of my said son • • • then living, all of the said real estate, to take share and share alike, and to their heirs and assigns forever."

The court's comment on the above devise was as follows: "The testator did, in part, select a fixed line of inheritable succession limited to the issue of the body of his devisee, but by express inclusion he then provided that the heirs and assigns of the devisee were to take, and thus the regular and general succession of the statutory heirs at law was not cut off. Under the terms of the devise, the line of inheritable succession in the selected line could not continue so long as

posterity endures in the regular course of descent, for the testator has provided otherwise, and for that reason no estate tail in the first taker was created. The result is that the devisees named as taking life estates took life estates and no more, the remainders going to the issue and the heirs and assigns of such issue of the respectively named devisees of the life estates."

The language above quoted applies with equal force to the case at bar. In the Brann case, as in the instant case, the line of inheritable succession was broken by giving grandchildren complete power of disposition.

Fee tail estates were recognized in Kansas prior to 1939 when our legislature saw fit to abolish them. G. S. 1947 Supp. 58-502. For the purpose of clarity it may be said that in an instrument which became operative prior to the enactment of the mentioned statute, unless it clear-

ly appears that an estate tail is intended, the construction will be otherwise.

Having concluded that the devise in question did not create an estate tail but created a life estate with remainder over to the children of the life tenant, the next inquiry is one of classifying the remainder. Again we must look to the intention of the testator. Did he intend that the remainder vest at his demise, or at the time of his son's death? Generally, where an estate vests in a class certain but subject to a preceding life tenancy, the conveyance is held to pass a present vested interest in the remaindermen unless a contrary intent clearly appears. In the recent case of In re Estate of Works, supra, and cases cited therein, we said: "The law favors vested rather than contingent remainders. If there is doubt whether the testator intended a remainder should vest at his death or at the ter-

mination of a life estate the doubt will be resolved in favor of the earlier vesting." And "In order to create a contingent remainder the intention so to do must be expressed in words so plain that no room for judicial construction remains." (168 Kan. 539, 213 P2d 999; Syl. paragraphs 3 and 4)

No contrary intention appearing, it must be held that the remainder estate vested at testator's death. Appellee M. W. Patrick Barkley, therefore, takes an undivided one-sixth interest in the property as the sole heir of his deceased wife who was a daughter of Orian Louis Atherton. The interest passing to the grandchildren may be classified as a vested remainder subject to open to let in after born children of their father.

Appellants contend the case of Meyer v. Meyer, 149 Kan. 23, 86 P2d 493, controls

the instant case. The Meyer case is not authority for the decision that a fee tail estate was created in Orian Louis Atherton. In the Meyer case, a life estate was created in Henry Meyer, and at his death the will devised the real estate in fee simple to the "heirs of his body". In the instant case, a life estate was created in Orian Louis Atherton and after his death, the property was to descend to the children of his body. Had the testator stopped at this point, it undoubtedly would have created an estate tail. However, the fourth paragraph of the will continues with the following words: "and that the same be held by them and for their use for a period of twenty years from the time of the death of the said Orian Louis Atherton, after which time the said children of my son, Orian Louis Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

It would appear that this court cannot ignore or misinterpret the effect of the italicized portion of paragraph four, to wit: "and may hold the same or dispose thereof in any manner they wish." Thus it is clear that the controlling words lead the court to determine that a fee tail estate was not created in this case as it was created in the Meyer case by the words "heirs of the body".

The contention next raised is that certain proceedings had in Rooks County District Court are res judicata of the material facts and issues in the case at bar. Rooks County District Court case No. 7843 was a case involving Orian Louis Atherton and the living heirs of his body, tried in 1944. It arose through an application for the appointment of a trustee for the unknown and unborn contingent remaindermen, to the end that a valid oil and gas lease might be executed on the

property involved in this litigation. In that case no construction of the J. E. Atherton will was sought or made. Rooks County District Court case No. 7807, while involving a provision of the J. E. Atherton will very similar to paragraph four, was not between the same parties as the case at bar, nor was the same land involved. The elements of the doctrine of res judicata are set out in Atchison & Eastern Bridge Co. v Board of County Com'rs. of Atchison County, 150 Kan. 24 (Syl. para. 5), 91 P2d 34, 35: "An issue is res judicata only when the following conditions exist: identity in the things sued for, identity of the cause of action, identity of persons and parties to the action, and identity in the quality of the persons for or against whom the claim is made." It can readily be seen that neither Rooks County District Court case No.7843 nor 7807 meets this test. AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF KANSAS

MARY CATHERINE SHEPARD, et al,

Plaintiffs,

vs.

D. A. HINDMAN, et al,

Defendants.

Case No. T-3987

JOURNAL ENTRY OF JUDGMENT

NOW on this 17th day of July, 1970, the above entitled matter comes before the court for hearing on the following motions: Motion of Frank C. Sabatini, Lawrence D. Munns and Joel A. Sterrett to Withdraw as Counsel for Plaintiffs Christensen and Scott; Motions for Summary Judgment by the defendants Hindman and Lynd, Tomlinson-Kathol, et al, and Magnolia Pipeline; and Motions by plaintiff Marvin J. Morse for Leave to File Amended Complaint, to Enjoin Mobil Oil from Distributing Funds and to Strike Irrelevant and Redundant Material from File.

Appearances were: Frank C. Sabatini and Lawrence D. Munns for plaintiffs Christensen and Scott; Marvin J. Morse pro se; Richard Jones and Steven Jones for defendant Magnolia Pipeline; Benjamin C. Langel for defendants Tomlinson-Kathol, Inc., William T. Kemper,

Ray H. Quackenbush, Eugene Crabtree, Frank E. Hedrick, Theodore Carter, Jim Donham, E. Davis Hickman, Jessie I. Wilcoxon, The Fourth National Bank and Trust Co., Wichita, Kansas, Warren E. Tomlinson, Gerald J. Kathol, Oread Oil Company, Inc., Joe Hickman, Barton Oil Co., Charles W. Aikens, James W. Owen, Russell Cobb, Jr., and Lydia E. Kearns; Thomas C. Triplett for defendants D. A. Hindman, Pauline Hindman, Charley A. Lynd, and Elida Lynd.

The court, after considering arguments of counsel, the court file, the certified opinion of the Supreme Court of Kansas in Hindman and Lynd v Shepard, Case No. 45,622, and the order denying a rehearing in that case, made the following findings:

1. The motion by Frank C. Sabitini, Lawrence D. Munns and Joel A. Sterrett with respect to their withdrawal as counsel for plaintiffs Christensen and Scott is granted. The court denies the additional request in the motion that all matters be continued from thirty (30) days from the date of the order to permit the parties to obtain new counsel. The court finds that these parties were mailed copies of the Motion to Withdraw as Counsel in May, 1970, and that the original date for hearing the Motion on June 12, 1970, was continued to allow the parties to obtain counsel. These parties have not expressed any indication that they desire to obtain other counsel. Any further continuance in this case will only cause further unnecessary delay.

2. The court finds that the decision of the Kansas Supreme Court in Case No.45622 styled D. A. Hindman and Charley A. Lynd vs. Mary Catherine Shepard, et al, is res judicata to all

matters and issues in this case, and, accordingly summary judgment should be entered in favor of the defendants and against all the plaintiffs.

3. In light of the court's decision sustaining the defendant's Motions for Summary Judgment, the remaining Motions, all by plaintiff Marvin J. Morse, should be and are hereby denied.

THEREFORE, THE COURT ORDERS, ADJUDGES AND DECREES that Frank C. Sabitini, Lawrence D. Munns and Joel A. Sterrett are granted leave to withdraw as counsel for plaintiffs Christensen and Scott; that the motions for Summary Judgment of defendants Hindman and Lynd, Tomlinson-Kathol, et al, and Magnolia Pipeline, are hereby sustained; that the Motion for Leave to File Amended Complaint, Motion to Enjoin Mobil Oil from Distributing Funds and Motion to Strike Irrelevant and Redundant Material From File of Plaintiff Marvin J. Morse are hereby denied; that the costs of this action be taxed to the plaintiffs jointly.

IT IS SO ORDERED.

GEORGE TEMPLAR, Judge

Dated August 25, 1970

IN THE DISTRICT COURT

OF ROOKS COUNTY, KANSAS

No. 7807

Charley A. Lynd, *Plaintiff*

vs.

Barbara Hillman and Gene Hillman, her husband; Catherine Sheppard and Fred Sheppard, her husband; Laura Merritt, single; Margaret Christensen and Alfred Christensen, her husband; Anna Alley and Clarence Alley, her husband; Elida Merritt and Leslie Merritt, her husband; Frances Gfeller and Myron Gfeller, her husband; Bernadine Wasinger and Linus Wasinger, her husband; Flora E. Ouderkirk and O. C. Ouderkirk, her husband; Orian Louis Atherton, single; Martha M. Gish and Samuel Gish, her husband; Barbara Hillman, Catherine Sheppard, Laura Merritt, Margaret Christensen, Anna Alley, Elida Merritt, Frances Gfeller and Bernadine Wasinger as representative of a class under the Last Will and Testament of James E. Atherton, deceased; The unknown heirs, executors, administrators, devisees, trustees and assigns of James E. Atherton, deceased, and of Mary L. Atherton, deceased, *Defendants.*

JOURNAL ENTRY

Now to-wit on this 12th day of April, 1944, the same being one of the adjourned days of the regular January,

1944, term of said Court, and one of the regular designated Court days thereof, Plaintiff appearing in person and by his attorney, D. A. Hindman of Stockton, Kansas, Defendants, Barbara Hillman, Catherine Sheppard, Margaret Christensen, Elida Merritt, Bernadine Wasinger, Martha M. Gish, Orian Louis Atherton, Laura Merritt, Anna Alley, Frances Gfeller and Flora E. Ouderkirk making default both as to appearance and filing of pleadings herein, and all other defendants appearing by their attorney, W. McCaslin, appointed herein under Soldiers' and Sailors' Civil Relief Act of 1940 and amendments thereto, the above entitled cause came regularly on for trial.

THEREUPON, the Court finds that personal service has been procured upon all of the following named defendants, to-wit: Frances Gfeller and Myron Gfeller, her husband; Frances Gfeller, as representative of a class under the Last Will and Testament of James E. Atherton, deceased; Anna Alley and Clarence Alley, her husband, and Anna Alley as representative of a class under the Last Will and Testament of James E. Atherton, deceased; Laura Merritt, single, and Laura Merritt as representative of a class under the Last Will and Testament of James E. Atherton, deceased; and Flora E. Ouderkirk, and O. C. Ouderkirk, her husband, and that service by publication has been procured upon all of the other defendants herein, proof of which is filed herein and said service and proof thereof are due, legal and regular in all respects and are approved by the Court.

THEREUPON, the Court finds that the following named defendants upon whom service by publication has been procured, to-wit: Barbara Hillman, Catherine Sheppard, Margaret Christensen, Elida Merritt, Bernadine Wasinger, Martha M. Gish and Orian Louis Atherton have received personal knowledge of the pendency of this action on or before March 14th, 1944, by a registered letter containing a copy of the publication notice herein,

each of whom signed a return receipt acknowledging receipt of said registered letter containing said notice, said receipts and an affidavit pertaining thereto made by D. A. Hindman being filed herein.

THEREUPON, the Court finds that none of the following named defendants, to-wit: Barbara Hillman, Catherine Sheppard, Margaret Christensen, Elida Merritt, Bernadine Wasinger, Martha M. Gish, Orian Louis Atherton, Laura Merritt, Anna Alley, Frances Gfeller and Flora E. Ouderkirk are now or have been for a period of Sixty (60) days next prior to this date in the Military Service of the United States, or any of her allies as defined by Soldiers' and Sailors' Civil Relief Act of 1940 and amendments thereto, and are not now ordered for induction into the military service of the United States as defined by said act, evidence of which in the form of an affidavit by D. A. Hindman, attorney for Plaintiff, being filed herein, and said affidavit and form thereof, is approved by the Court. Said military status applying to said defendants in their individual and representative capacities. That W. McCaslin has been appointed attorney for all other defendants herein under said Soldiers' and Sailors' Civil Relief Act of 1940 and amendments thereto, and has filed an answer herein in behalf of said defendants consisting of a general denial.

THEREUPON, all parties present announced, ready for trial.

THEREUPON, Plaintiff introduced his evidence and rested.

THEREUPON, all parties present announced there was no further evidence to offer.

THEREUPON, the Court being fully advised in the premises and after due consideration finds that the allegations contained in Plaintiff's Petition are true; that the Last Will and Testament of James E. Atherton, deceased, created an estate in fee tail in the following described real property, to-wit:

All that part of Section Thirty-two (32) lying South of the Union Pacific Railroad right of way in Township Nine (9) South, Range Nineteen (19) West, consisting of Three Hundred Thirty-three (333) acres, more or less, in Rooks County, Kansas,

to George W. Atherton, and the children of his body, and the Last Will and Testament of said decedent is so construed; that the deed executed and delivered to Plaintiff by George W. Atherton and Hattie Atherton, his wife, covering the above described real property, on the 11th day of February, 1944, and being recorded in Book 52 and Page 270 of the deed records of Rooks County, Kansas, conveyed a full, complete, and fee simple title in said property to Plaintiff.

THE COURT FURTHER FINDS that Plaintiff is the owner in fee simple and in the quiet peaceable possession of the above described real property, and that his title should be forever quieted as against all defendants herein, and all persons consisting of the same class, or classes, as, or represented by, any of the defendants herein, and all persons claiming under or through them, or either of them, and all defendants herein, and by all persons consisting of the same class, or classes, as, or represented by, any of the defendants herein, and all persons claiming under or through them, or either of them, should be forever barred and enjoined from claiming any right, title, or interest in and to said property, or any part thereof adverse to the title of this Plainiff.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, DECREED and ADJUDGED that the findings of this Court as stated above, be, and they are hereby decreed a valid and binding Judgment.

IT IS FURTHER BY THE COURT CONSIDERED, ORDERED, DECREED and ADJUDGED that Plaintiff is the owner in fee simple of the above described real property and his title is forever quieted as against all defendants herein, and

all persons consisting of the same class, or classes, as or represented by, any of the defendants herein, and all persons claiming under or through them, or either of them; and all defendants herein, and all persons consisting of the same class, or classes, as, or represented by, any of the defendants herein, and all persons claiming under or through them, or either of them, are forever barred and enjoined from claiming any right, title, or interest in and to said real property, or any part thereof adverse to the title of this Plaintiff. The costs of this action are taxed to Plaintiff.

W. K. SKINNER,
JUDGE.

O.K. D. A. HINDMAN

Stockton, Kansas
Attorney for Plaintiff

O.K. W. McCASLIN
Stockton, Kansas

Attorney appointed to represent Defendants under Soldiers' and Sailors' Civil Relief Act of 1940.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 929

MARVIN J. MORSE,
Appellant,

vs.

D. A. HINDMAN and CHARLEY A. LYND,
Appellees.

ON APPEAL FROM THE KANSAS SUPREME COURT

MOTION TO DISMISS

D. A. Hindman and Charley A. Lynd, Appellees, file this Motion to Dismiss pursuant to Rule 16-1(a) and (b) of the Supreme Court Rules. In support of this Motion, these Appellees state the following facts and arguments.

This is an appeal from the final judgment of the Supreme Court of Kansas in the case of *Hindman, et al.* v. *Shepard, et al.*, cited at 205 Kan. 207 (1970). There is also existing a companion case which was brought in the United States District Court for the District of Kansas

entitled *Shepard, et al.* v. *Hindman, et al.*, Case No. T-3987. These two cases have been the subject of three previous Petitions for Writ of Certiorari filed by the Appellant, Marvin J. Morse. On February 10, 1969, and on February 24, 1969, Morse filed two Petitions for Writ of Certiorari in this Court (No. 1031 and No. 1081, October Term, 1968). Both of these Petitions were denied on April 1, 1969, and Leave to File Petitions for Rehearing was denied on May 17, 1969. On December 29, 1969, the Appellant filed another Petition for Writ of Certiorari (No. 1007, October Term, 1969). This Petition was denied on February 24, 1970.

It would be of questionable benefit and unnecessarily lengthen this Motion to set forth all the facts involved in this appeal. The facts relevant to the merits of the controversy are set forth in the judgment by the Supreme Court of Kansas and in the briefs (in opposition to the previous three Petitions for Writ of Certiorari) filed by these Appellees and other respondents. However, certain facts pertaining to this Motion warrant mentioning.

Originally, this case was commenced by the Appellees in the District Court of Rooks County, Kansas, as a quiet title action. Certain of the defendants, which did not include the Appellant, Marvin J. Morse, requested that the action be tried to a jury. Based on its interpretation of Kansas law, the trial court held that the case was not properly triable to a jury. A trial was held by the court and judgment was entered in favor of the Appellees. Morse and other defendants in the case appealed to the Supreme Court of Kansas which affirmed, on April 11, 1970, the judgment of the trial court. Morse filed a Motion for Rehearing by the Supreme Court of Kansas which was denied June 4, 1970. Morse then filed a Notice of Appeal to the Supreme Court of the United States, a copy of

which is attached to this Motion and marked Exhibit "A". The Notice stated that the appeal was from the Kansas Supreme Court's denial of the Petition for Rehearing. On August 24, 1970, an Order was entered by this Court by Associate Justice Byron R. White extending the time for docketing the appeal to November 1, 1970. However, the appeal was not docketed until November 2, 1970.

It is Appellees' contention that the above facts clearly indicate that the appeal does not involve a substantial federal question and that the appeal was not taken in conformity with the statutes or rules. The reasons for Appellees' contention are stated below:

1. The Notice of Appeal designates the Supreme Court of Kansas' Denial of the Petition for Rehearing entered on June 4, 1970, as the only judgment from which the appeal is taken. This final judgment affecting the matters in controversy was the opinion by the Supreme Court of Kansas on April 11, 1970. A notice of appeal has not been filed as to this judgment. The judgment concerning the Denial of Petition for Rehearing is not a judgment involving substantial federal questions.

2. The time to docket this appeal was extended by Associate Justice Byron R. White by an Order dated August 24, 1970, to and including November 1, 1970. However, the Appellant did not docket the appeal until November 2, 1970, as shown by Exhibit "B" attached hereto. Therefore, the appeal was not docketed within the time required under Rule 13 of the Supreme Court Rules.

3. The question of a right to a jury trial under the circumstances in this case does not involve a substantial federal question but a question of Kansas law. It should further be noted that the demand for a jury trial in this case was made by parties other than the Appellant who

are not appealing, and that the Appellant did not make a demand for a jury trial.

4. The remaining question raised in this appeal is whether the United States District Court for the District of Kansas had exclusive jurisdiction over the matters involved between the parties which would preclude any exercise of jurisdiction by State Courts of Kansas. The State Courts and Federal District Courts have repeatedly held in these two cases that their jurisdiction was concurrent. This question was the subject of Appellant's previously mentioned Petitions for Writ of Certiorari, which were all denied by this Court. It is submitted that this question, which has been denied review on three other occasions, is not a substantial federal question.

For the reasons stated above, it is respectfully requested that this court enter an order dismissing this appeal.

Respectfully submitted,

ROBERT MARTIN
1111 Vickers Tower
Wichita, Kansas 67202
Attorney for Appellees,
D. A. Hindman and
Charley A. Lynd

EXHIBIT "A"

No. 45622

IN THE SUPREME COURT OF THE STATE OF KANSAS

D. A. HINDMAN and CHARLES A. LYND,
Appellees,

vs.

MARY CATHERINE SHEPARD, et al.,
Appellants

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that appellant Marvin J. Morse hereby appeals to the Supreme Court of the United States from the judgment and the final order of this court, denying the petition for rehearing, entered in this action on June 4, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

By /s/ Marvin J. Morse
Marvin J. Morse
Pro-se appellant
980 Barkley Court
Pinole California

PROOF OF SERVICE

Appellant Marvin J. Morse certifies that on the 13th day of July, 1970, he deposited in the United States mail, postage prepaid, a copy of the attached notice of appeal addressed to each of the following parties:

Frank Sabatini and Joel Sterrett, 1108 First National Bank Building, Topeka, Kansas

Tom C. Triplett, 1111 Vickers Tower, Wichita, Kansas

Harold A. Morse, 3298 S. Elm Street, Denver, Colorado

Donald E. Morse, Rt. #2, Parma, Idaho

Ralph L. Morse, 980 Barkley Court, Pinole, California

Esther R. Hanzen, P. O. Box 332, Pendleton, Oregon

Shirley Y. Henderson, P. O. Box 332, Pendleton, Oregon

Catherine Ransom, Payette, Idaho

Frances Gfeller, Sharon Springs, Kansas

Laura Merritt, 5275 W. 1st Avenue., Apt. 116, Denver, Colorado

Elida Merritt, 970 North 11th Street, Laramie, Wyoming

Anna Alley, Sharon Springs, Kansas

Barbara Hillman, 623 N. 7th Street, Wakeeney, Kansas

Margaret Christensen, Monticello, Utah

/s/ Marvin J. Morse
Marvin J. Morse

EXHIBIT "B"

SUPREME COURT OF THE UNITED STATES

October Term, 1970

MARVIN J. MORSE et al.,
Appellant
vs.
D. A. HINDMAN AND CHARLEY A. LYND
Appellee
No. 929

To Mr. Thomas C. Triplett, Counsel for Appellee D. A. Hindman and Charley A. Lynd.

You Are Hereby Notified that an appeal in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 2nd day of Nov., 1970.

/s/ Marvin J. Morse
Appellant Pro-se
980 Barkley Ct.
Number and Street
Pinole, Calif. 94564
City, State and Zip Code

NOTE: Please indicate whether the case is an appeal or a petition for certiorari by crossing out the inapplicable terms. A copy of this notice need *not* be filed in the Supreme Court.